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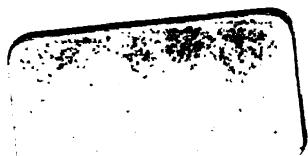
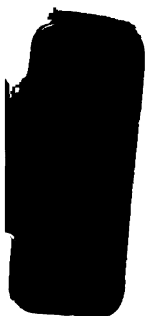
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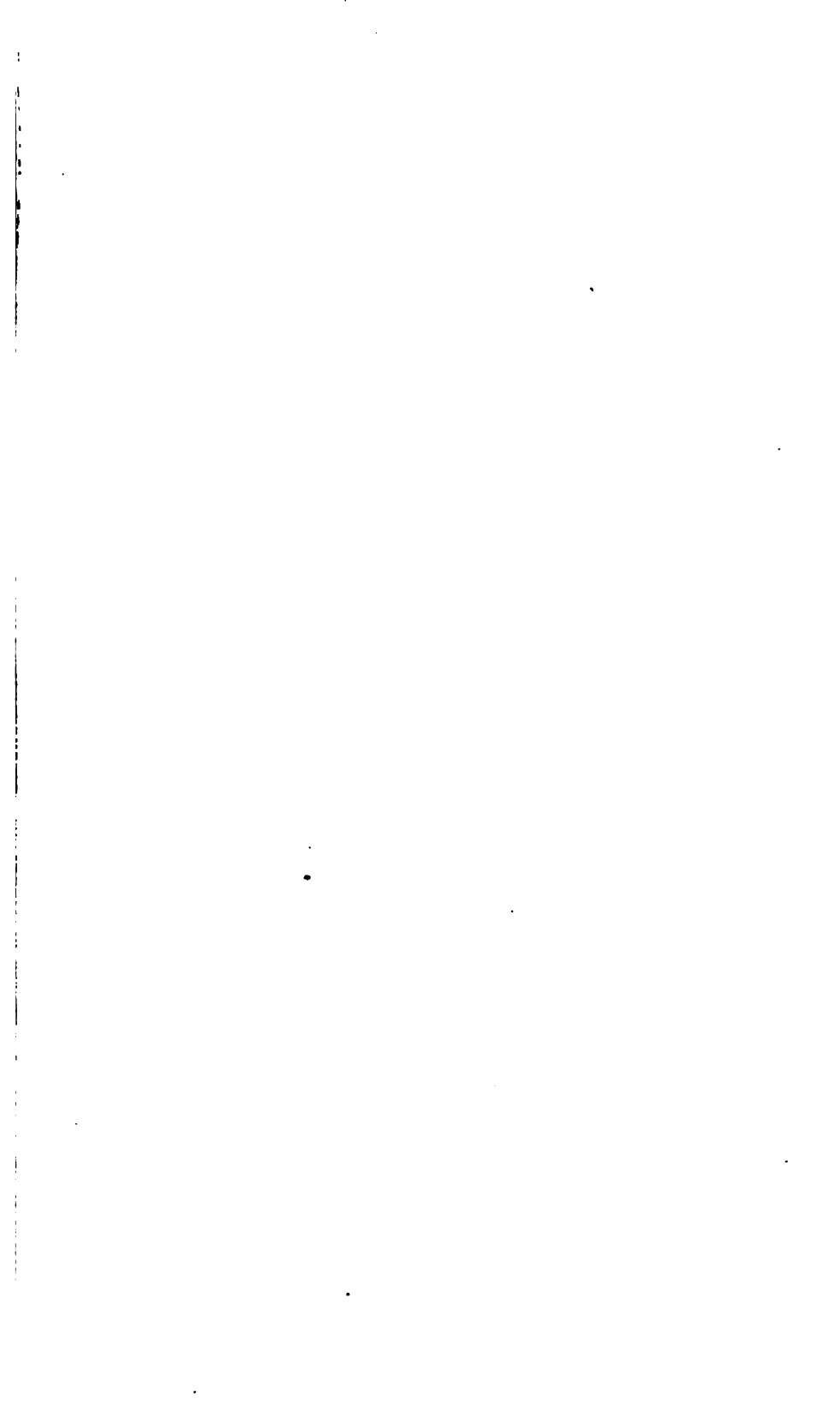
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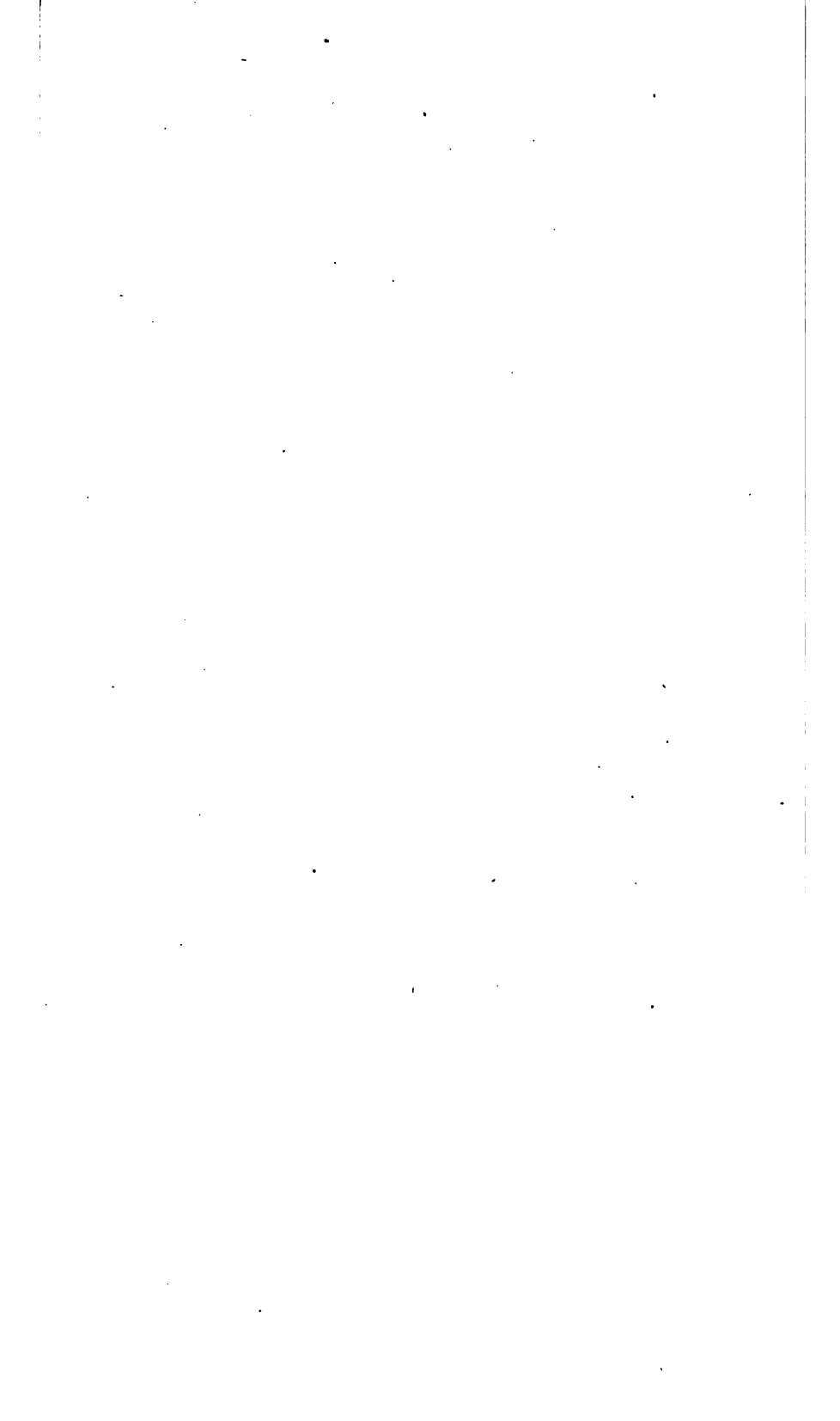
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

**SCHOLAR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

Vol. XL.

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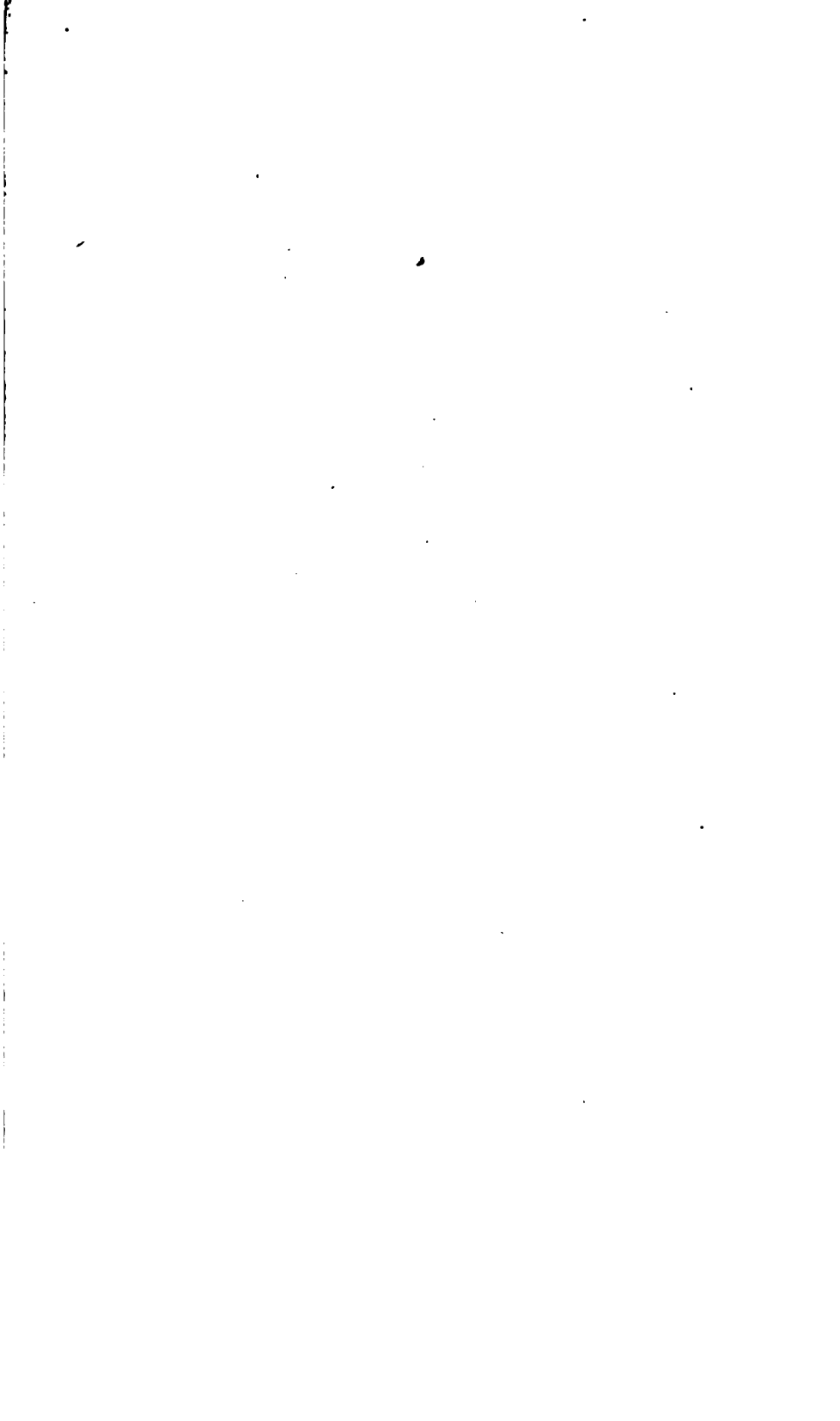
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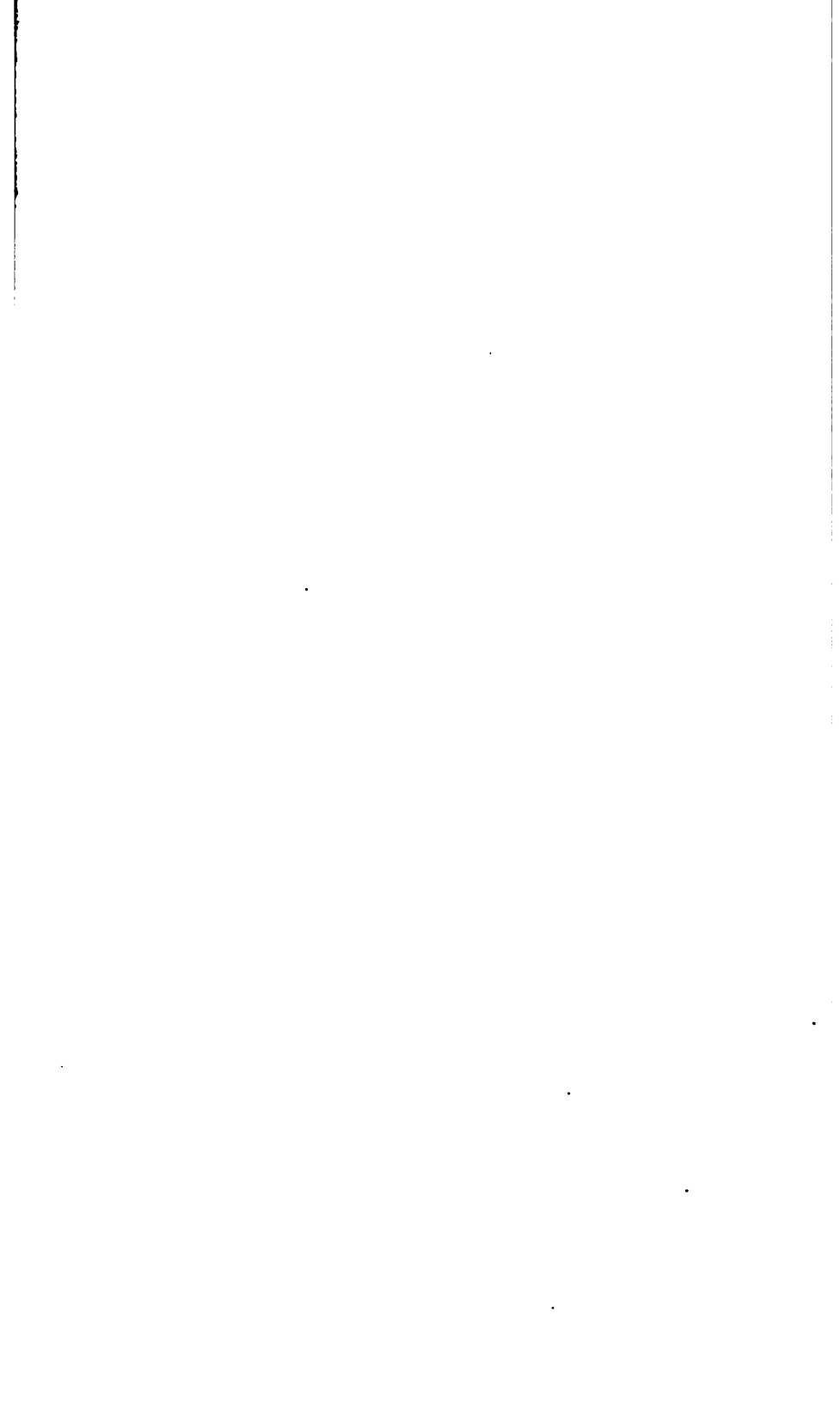
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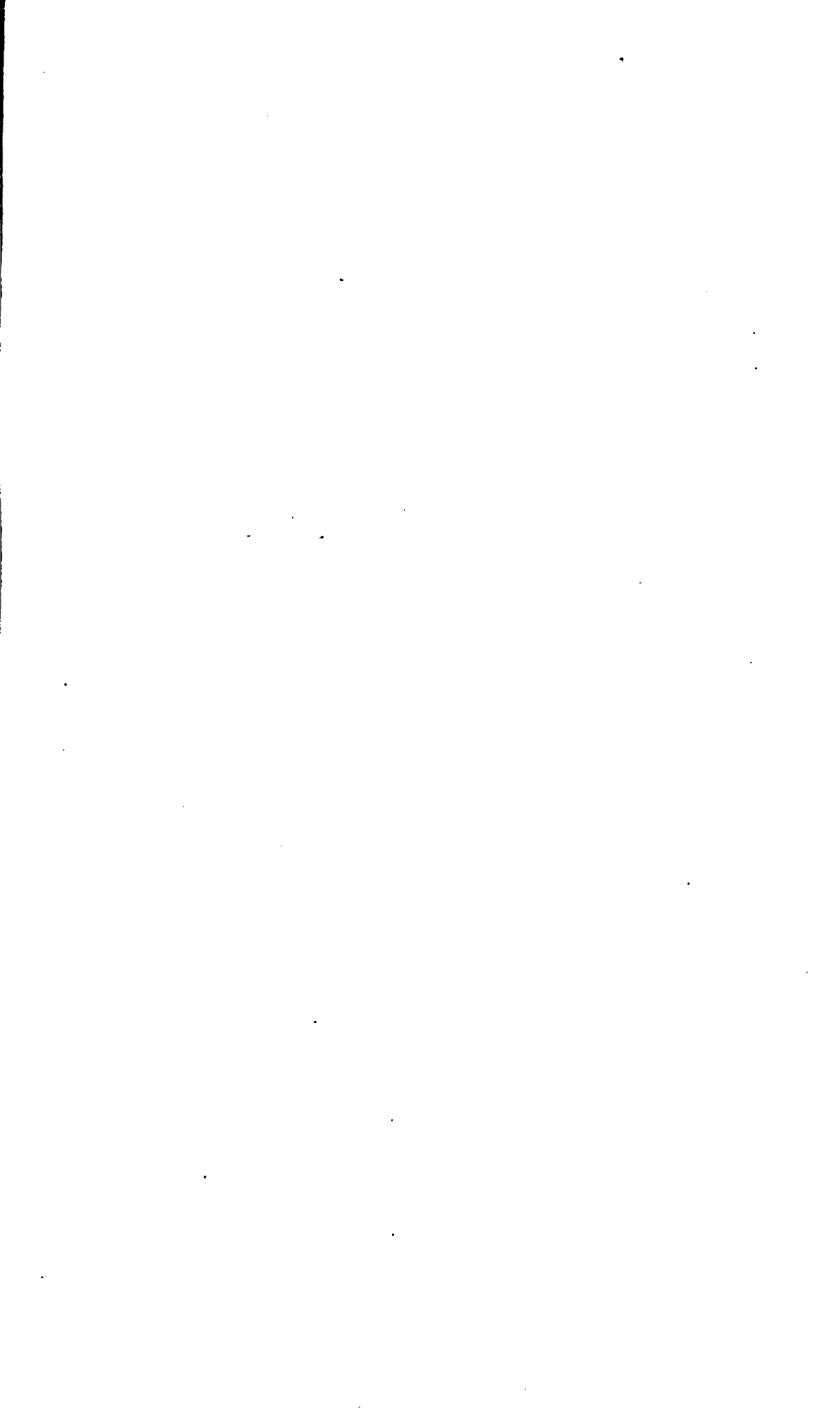
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AMERICAN DECISIONS.
VOL. XL



CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

FITCH v. NEWBERRY.

[1 DOUGLASS, 1.]

A COMMON CARRIER IS BOUND TO RECEIVE AND CARRY GOODS only where offered by their owner or his authorized agent, and only upon prepayment of the freight, if required.

A COMMON CARRIER WHO HAS RECEIVED GOODS WITHOUT THE CONSENT of the owner, express or implied, to their delivery, can not detain them against the latter for transportation charges.

NO LIEN EXISTS FOR FREIGHT IN FAVOR OF A CARRIER unless the relation of debtor and creditor exists between the owner and carrier, so that an action at law might be sustained for the recovery of the freight.

A CARRIER INTRUSTED WITH GOODS CAN NOT, BY TRANSFERRING them to another carrier for transportation to the designated point, confer upon the latter a right to freight as against the owner of the goods.

REPLEVIN. The goods for which this action was brought were the property of plaintiffs. They were by the latter delivered at Port Kent, in the state of New York, to the New York and Michigan Line, a company engaged in the transportation of goods between New York and Michigan, for carriage to Detroit, Michigan. The freight was paid in advance. By some means, it does not appear how, the goods, upon their arrival at Albany, New York, one of the points of transshipment, came into the hands of Robert Hunter & Co., agents and part owners in the Merchants' Line, a company also engaged in the business of transportation between New York and Michigan. The goods were forwarded by Robert Hunter & Co., by the Merchants' Line, to Detroit, consigned to defendants, who were also part owners of and agents for the said Merchants' Line. The freight charged by the Mer-

chants' Line for such transportation was paid upon the arrival of the goods at Detroit by the defendants, and the goods were stored by them in their warehouse there. Afterwards a demand was made upon defendants by plaintiffs for the goods, but was refused by the latter unless payment was first made to them of the amount that had been paid by them for the freight upon the goods, and also of the amount claimed by them for compensation for storing the goods. This action was thereupon brought. The above facts were found by a special verdict, and the case was certified to this court for its opinion.

H. H. Emmons, for the plaintiffs.

George C. Bates, *contra*.

By Court, RANSOM, J. Upon the facts found in the special verdict, several questions were raised, but the most important, and the only one which we deem it necessary to consider, is, whether the defendants had acquired a lien upon the goods, which they could enforce, even against the owners, the plaintiffs in this case.

On the part of the defendants, it is contended that a common carrier who receives goods for carriage and transports them, may detain them by virtue of his lien, for freight, even against the owner, in case the freight has been earned without fraud or collusion on his part; that, if goods be stolen, or otherwise tortiously obtained from the legal owner, at New York or elsewhere, and carried by a transportation line from thence to Detroit, without a knowledge of the theft on the part of the carrier, he would be entitled to a lien for freight, even against the owner. This doctrine is sought to be maintained by the defendants' counsel, on several grounds: 1. He insists that a common carrier is bound to receive goods which are offered for transportation, and to carry them; that it is not a matter of choice whether he will receive and carry them or not; that he is liable to prosecution if he refuses. 2. That a common carrier is not only bound to receive and transport goods that are offered, but he is liable for their loss, in all cases, except by the act of God and public enemies; and the same rule, he insists, applies to warehousemen and forwarders. 3. That the duties and obligations of common carriers and innkeepers are, in all respects, analogous; and an innkeeper is bound to receive and entertain guests, and to account for a loss of their baggage while under his care. 4. That a common carrier, being bound by law to accept goods offered him for carrying, and being responsible for their safe delivery in all cases, except when prevented by the act

of God or public enemies, is entitled to a lien for their freight, against all persons, including even the owner, when the goods were tortiously obtained from him; that he is not bound to inquire into the title of the person who delivers them: and such lien exists, although there be a special agreement for the price of carriage. 5. That the master is not bound (nor his agent for him) to deliver any part of a cargo until the freight and other charges are paid.

But for the plaintiffs it is contended: 1. That liens are only known or admitted in cases where the relation of debtor and creditor exists, so that a suit at law may be maintained for the debt which gives rise to the lien; that a lien is a mere right to detain goods until some charge against the owner be satisfied. 2. That the defendants obtained possession of the goods without authority from the owners, either express or implied; that no legal privity exists between the parties, and therefore the relation of debtor and creditor does not exist between the defendants or their principals and the plaintiffs, and no action could be maintained by either against them for the freight, or any part of it. 3. They contend further, that, even if the defendants lawfully received the goods from the original carriers of the plaintiffs, the New York and Michigan Line, they did so as their agents and servants, and were bound by their agreement with the plaintiffs; that their contract of affreightment is incomplete, and therefore no freight is due.

That common carriers are bound to receive goods which are offered, by the owners or their agents for transportation and to carry them for a just compensation, upon the routes which they navigate, or over which they convey goods in the prosecution of their business, is too well settled to require discussion, although this general proposition is subject to some qualifications. Chancellor Kent says, 2 Kent's Com. 598: "Common carriers undertake generally, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, and with or without a special agreement as to price. They consist of inland carriers by land or water, and carriers by sea; and as they hold themselves out to the world as common carriers, for a reasonable compensation, they assume to do, and are bound to do what is required of them in the course of their employment, if they have the requisite conveniences to carry, and are offered a reasonable or customary price; and if they refuse, without some just ground, they are liable to an action." The books, English and American, are filled with strong cases affirming this doc-

trine: See *Jackson v. Rogers*, 2 Show. 332; *Elles v. Gatward*, 5 T. R. 143; *Batson v. Donovan*, 4 Barn. & Ald. 32; *Dwight v. Breusster*, 1 Pick. 50 [11 Am. Dec. 133], and numerous other cases, and the elementary writers *passim*.

That common carriers are responsible for the safe conveyance and delivery of the goods committed to them for carriage, is just as conclusively settled as that they are bound to receive and carry them. A common carrier is said to be in the nature of an insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the excepted cases of the act of God, or inevitable accident without the intervention of man, and public enemies: 2 Kent's Com. 597; *Coll v. McMecken*, 6 Johns. 160 [5 Am. Dec. 200]. This doctrine is sustained by a series of decisions running back through a period of more than a century and a half: *Proprietors Trent Navigation v. Wood*, 8 Esp. 127; *Dale v. Hall*, 1 Wils. 261; *Forward v. Pittard*, 1 T. R. 33; *Hyde v. Trent Navigation Company*, 5 Id. 389. Another position taken by the defendants' counsel, that the duties of common carriers and innkeepers are analogous, may be admitted. As a general proposition it can not be denied. Upon the obligations and liabilities imposed on common carriers, for the transportation, safe custody, and delivery of goods, the counsel for the defendants base a corresponding right to compensation for such transportation and delivery, and a lien on the goods for its payment. If, as contended for by the defendants, a carrier is bound to receive and carry all goods offered for transportation, without the right of inquiring into the title or authority of the person offering them, then clearly he should be entitled to a lien, even against the owner, upon the goods, until he is paid for the labor he may bestow in their carriage.

Let us now inquire whether such is the law. The doctrine is certainly opposed to all the analogies of the law, and it seems to me to every principle of common justice. The only adjudged case I have been able to find, which favors it, is *Yorke v. Grenough*, 2 Ld. Raym. 866. That was replevin for a gelding. The defendant, who was an innkeeper, received the horse from a stranger, who had stolen him. On demand being made for the horse, by the owner, the defendant, who was ignorant of the theft when he received him, refused to deliver him up until paid for his keeping, insisting on his right of lien. The court held it reasonable that he should have a remedy for payment, which was by retainer; and that he was not obliged to consider who was the

owner of the horse, but whether he who brought him was his guest. And Holt, C. J., cited the case of the *Exeter Carrier*, which he thus stated: Where A. stole goods, and delivered them to the Exeter carrier, to be carried to Exeter, the owner finding the goods in the possession of the carrier, demanded them of him. The carrier refused to deliver them, without being first paid for the carriage. The owner brought trover for his goods, and it was adjudged that the defendant might detain them for the carriage, on the ground that the carrier was obliged to receive and carry them. Powell, J., denied the authority of the Exeter case, but concurred with Chief Justice Holt in the decision of the case then under consideration.

There is an obvious ground of distinction between the cases of carrying goods by a common carrier, and the furnishing keeping for a horse by an innkeeper. In the latter case, it is equally for the benefit of the owner to have his horse fed by the innkeeper, in whose custody he is placed, whether left by a thief or by himself or agent; in either case, food is necessary for the preservation of his horse, and the innkeeper confers a benefit upon the owner by feeding him. But can it be said that a carrier confers a benefit on the owner of goods, by carrying them to a place, where, perhaps, he never designed and does not wish them to go? Or, as in this case, is the owner of goods benefited by having them taken and transported by one transportation line, at their own price, when he had already hired and paid another to carry them at a less price? This distinction does not, however, at all affect the determination of the case before us; we place it entirely upon other grounds.

The case of *Bevan v. Waters*, 14 Eng. Com. L. 698, was cited to show that a carrier was not bound to inquire into the title of a person offering goods for carriage. In that case the plaintiff bought two horses of defendant, which had been previously placed in the possession of one Boast, a livery stable keeper, for feeding and training. When the plaintiff, after the purchase, applied to Boast for the horses, he refused to deliver them till paid for keeping and training, which the plaintiff paid, amounting to one hundred and thirty pounds, and then brought *assumpsit* against the defendant for the money. He was allowed to recover on the ground that Boast had a valid lien upon the horses, and that the sale by defendant to the plaintiff created such a privity between them, as authorized the plaintiff to discharge the lien and resort to the defendant for repayment. The

decision of that case, it is seen, does not rest at all upon the ground contended for here by the defendants.

Several elementary authorities are also cited by defendants' counsel, in support of the doctrine assumed, but they are found in every instance, to refer to the case of *Yorke v. Grenaugh*, 2 Ld. Raym. 866, and of course do not go far to fortify the position taken in this case; but leave it still resting upon the authority of that decision alone. All the other cases, in which the general proposition is laid down that common carriers are bound to receive goods offered for carriage, are evidently based upon the supposition that the goods are there offered by their owners or their authorized agents; and that, if in any way they acquire possession of property without consent of the owner, express or implied, they, like all other persons, may be compelled to restore it to such owner, or pay him for its value. And that the doctrine of *caveat emptor* applies, with the same force, to that class of persons as to others, is manifest, I think, from an examination of authorities.

The obligation of a common carrier to receive and carry all goods offered, is qualified by several conditions, which he has a right to insist upon before receiving them: 1. That the person offering the goods has authority to do so; 2. That a just compensation, or the usual price, be tendered for the carriage; and 3. That although the owner, or his agent, offer goods for carriage and tender payment for the freight in advance, still he is not bound to receive them, unless he have the requisite convenience to carry them.

In an action brought against a carrier for refusing to receive and carry goods, would it not constitute a valid defense that the plaintiff had stolen them, although, at the time of offering, the carrier may not have known they had been stolen? In Story on Bail., sec. 582, it is laid down that a carrier is excused for non-delivery of goods to the consignee, when they are demanded, or taken from his possession by some person having a superior title to the property. And, again, where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded and he resists it, he is liable to an action for the recovery of the goods. If, then, the owner could reclaim the goods in the hands of the carrier, after their delivery to him, and that would excuse a non-delivery to the depositor, it is clear that he would be justified in refusing to receive them

from one having a wrongful possession, although at the time of such refusal, he might not know the manner in which they had been obtained. So a carrier is, in all cases, entitled to demand the price of carriage before he receives the goods, and, if not paid, he may refuse to take charge of them: *Story on Bail.*, sec. 586; *Wright v. Snell*, 5 Barn. & Ald. 353; *Batson v. Donovan*, 4 Id. 32; *Oppenheim v. Russell*, 3 Bos. & Pul. 48; and *Whit. on Liens*, 92.

If, then, a common carrier may demand payment for carriage in advance, and if he may reject goods offered by a wrong-doer, or by one having no authority to do so, is he not bound to take care that the person from whom he receives them has authority to place them in his custody? In *Story on Bail.*, sec. 585, it is said: A carrier having once acquired the lawful possession of goods for the purpose of carriage, is not bound to restore them to the owner again, unless his due remuneration be paid; evidently presupposing the goods to have been delivered to him by the owner; and cites *Bradhurst v. Columbian F. Ins. Co.*, 9 Johns. 17; 3 Johns. Cas. 9. In *Lemprier v. Pasley*, 2 T. R. 485, it was held that goods, wrongfully delivered to the person claiming them, who paid freight and other charges, could not be detained for those expenses against the rightful owner. In 2 Kent's Com. 638, it is laid down that possession is necessary to create the lien, but though there be possession of goods, a lien can not be acquired when the party came to that possession wrongfully. So, if the party came to the possession of goods without due authority, he can not set up a lien against the owner: 2 Kent's Com. 638; *Daubigny v. Duval*, 5 T. R. 604; *Hiscox v. Greenwood*, 4 Esp. 174; *McCombie v. Davies*, 7 East, 5. In *Van Buskirk v. Purinton*, 2 Hall, 561, property was sold upon a condition; the buyer failed to comply with the condition, but shipped the goods on board the vessel of the defendants. The owner claimed the goods, demanded them, and on defendants' refusal to deliver them, brought trover for their value. The defendants insisted on their right of lien for the freight, but the plaintiff was allowed to recover.

In *Saltus v. Everett*, 20 Wend. 275 [32 Am. Dec. 541], the master of a vessel, with whom the defendant in error shipped goods from New Orleans to New York, during the voyage made a new bill of lading in his own name as owner. The goods at New York were sold to the plaintiff in error, who was ignorant of the shipmaster's fraud. The owner (the defendant in error) sued the purchaser for their value, or return. Senator

Verplanck, in the opinion which he delivered in the court of errors, held this doctrine: "The universal and fundamental principle of our law of personal property, is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser, under a defective title, can not hold against the true proprietor." And again, "there is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently:" Id. 281. "If the owner lose his property, or is robbed of it, or it is sold, or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise; or a qualified possession of it, for a specific purpose, as for transportation, or for work to be performed upon it, the owner can follow and reclaim it in the hands of any person, however innocent:" Id. 282.

In *The Anne*, 1 Mason, 512, persons not authorized by the owner took command of a vessel, and carried her out of the regular course of the voyage, and employed a pilot to take her into port, and he sought to enforce his lien on the vessel for pilotage. In deciding that case, the court say: "It can not be maintained, upon any acknowledged principles of law, that mere wrong-doers, or usurpers of the command of the ship, not acknowledged or appointed by the owner, can create a lien on the ship, or personally bind the owner, by a contract which they may choose to make, whether it be beneficial to him or not." In *Greenway v. Fisher*, 1 Car. & P. 190 (11 Eng. Com. L. 362), it was said that if goods be placed in the hands of a common carrier without the consent of the owner, and while he has them in possession, they be demanded and he refuse to deliver them, trover lies at the suit of the owner. In *Hoffman v. Carow*, 22 Wend. 318, the court say: "The doctrine of our decision is, that the original and true owner of movable property, who has not, by his own act or assent, given a color of title or an apparent right of sale to another, may recover its value from any one having it in possession, and refusing to deliver it up to him."

If it be said for the defendants that Allen, the master of the vessel on which the goods were originally shipped, or Eddy & Bascomb, the wharfingers and forwarders to whose care at Whitehall they were consigned, delivered them to the defendants, or to those from whom they received them, it may be replied, that if such were the fact, it would not affect the rights of the plaintiffs,

or the liabilities of the defendants, under the facts found by the special verdict in this case. The jury have found that the plaintiffs contracted with the New York and Michigan Line, to transport their goods to Detroit, and paid them the stipulated price for the carriage, in advance. The only power over the goods which that line derived from their contract with the plaintiffs, was, to safely carry and deliver them at the place of consignment. They had no authority to transfer them to any other line, and make the plaintiffs chargeable for the freight. And the defendants, under such a transfer, could acquire no right to compensation for freight as against the plaintiffs.

Nor had Eddy & Bascomb, from any fact appearing in the case, any authority to forward the goods, from Whitehall, by any conveyance other than that which the plaintiffs had directed, and which appeared upon the bill of lading that accompanied the goods. A special authority must be strictly pursued; and whoever deals with an agent, constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power: 2 Kent's Com. 631. No one can transfer to another a better title than he has himself, or a greater interest in personal property, than he or the person for whom he acts, possesses: *Hoffman v. Carow*, before cited. To create a lien, it is necessary that the party vesting it, should have the power to do so. A person can neither acquire a lien by his own wrongful act, nor can he retain one when he obtains possession of goods without the consent of the owner, express or implied: *Daubigny v. Duval*, 5 T. B. 606; 1 Saundf. Pl. and Ev. 326; 2 Stark. Ev. 360; *Andrew v. Dieterich*, 14 Wend. 31. It is quite clear that from no delivery made of the goods in question, by the original carriers, to the Merchants' Line, can any contract be implied that the plaintiffs would pay them for the freight, and thus lay the foundation for the lien claimed.

But if it be admitted that the owners or agents of the New York and Michigan Line, delivered the plaintiffs' goods to the defendants, or to those for whom they acted, they must be presumed to have received them as the agents of that line, and to have transported them from Albany to Detroit, for and on account of that line; and they, consequently, can resort to it alone for compensation. If the defendants are the agents of the New York and Michigan Line, they are bound by the contract of affreightment which that line made, and to entitle them to freight (had it not been paid in advance), they should show that contract strictly and fully performed, by a delivery of the goods

to the consignees named in the contract. It is not sufficient that the goods arrived at the port of destination, but there must be a delivery of them to perfect the right to freight: Ab. Sh. 273. It is a general and an acknowledged rule, that the voyage must be performed according to the contract, before the ship-owner or master can demand his freight. Conveyance and delivery of the cargo, are conditions precedent, and must be fulfilled. A partial performance is not sufficient, unless delivery be dispensed with, or prevented by the owner: *Palmer v. Lorillard*, 16 Johns. 356.

If the goods came to the hands of the defendants or their principals, without the agency of those who control the New York and Michigan Line, with or without fraud, as by finding them in a storehouse, or on a wharf at Whitehall, Albany, Buffalo, or elsewhere, it would not vary the case. If goods came to the possession of a person by finding, and he has been at trouble and expense about them, he has a lien upon the goods for compensation, in one case only, and that is the case of goods lost at sea; then there is a lien for salvage. This lien is allowed upon principles of commercial necessity, and is thought to stand upon peculiar grounds of maritime policy, and does not apply to cases of finding upon land: 2 Mason, 88; 2 Kent's Com. 635, and numerous cases there cited.

But it is insisted by the plaintiffs that a lien can only be created when the relation of debtor and creditor exists between the parties. A lien is defined to be a tie, hold, or security upon goods or other things, which a man has in his custody, till he is paid what is due him: 2 Pet. Dig. 692. In the case of the *United States v. Barney*, 5 Blatchf. 294, it was held that a lien can not exist against the government; for liens are only known or admitted, in cases where the relation of debtor and creditor exists, so as to maintain a suit at law for the debt or duty which gives rise to the lien, in case the pledge be destroyed, or the possession lost. An innkeeper can not, therefore, upon the ground of a lien, justify the arrest and detention of the horses employed in the transportation of the public mails: 2 Pet. Dig. 693; 2 Hall's L. J. 128. In *Oppenheim v. Russell*, 3 Bos. & Pul. 42, Justice Heath says: "There is a certain privity of contract, between the consignor of goods and the carrier, and it is evident that there is this privity of contract from this consideration, that if the consignee can not be found, or refuse to receive the goods, the carrier may come upon the consignor for the carriage of the goods, which he could not do, unless there was a privity of con-

tract between them." Is not the principle, decided in these cases, perfectly conclusive of the rights of the parties to this suit? It seems to me to be a proposition too plain to be controverted. That one man can not, by his own act, make another his debtor, without his consent, will not be questioned. Consequently, it is not sufficient to create the relation of debtor and creditor, that the plaintiff should have rendered services to the defendant, without also showing that the defendant assented to the services, and expressly or impliedly agreed to remunerate the plaintiff for them. *Bartholomew v. Jackson*, 20 Johns. 28 [11 Am. Dec. 237], is a strong case upon this point. The action was *assumpsit*, for removing a stack of wheat, without the knowledge of the defendant, to prevent its being burned. The court, in their decision of the case, adopt this language: "The plaintiff performed the service without the privity or request of the defendant, and there was, in fact, no promise, express or implied." *Everts v. Adams*, 12 Id. 352, where the plaintiff furnished medicines for a town pauper, and sought to charge the overseers of the poor, and *Dunbar v. Williams*, 10 Id. 249, where the plaintiff provided medicines to defendant's slave, without the knowledge of the owner, and numerous kindred cases, are to the same effect.

Schmaling v. Thomlinson, 6 Taunt. 147; 1 Eng. Com. L. 336, bears directly upon the question involved in this case. The action was for commission, work, and labor, and money paid for shipping and forwarding the goods of the defendants from London to Amsterdam. The defendants employed Aldibert, Becker & Co. to perform the business, and they employed the plaintiffs, who had no communication with, or knowledge of the defendants. The plaintiffs forwarded the goods as directed. The court decided there was no privity between the plaintiffs and defendants; that the defendants looked to Aldibert, Becker & Co. for the performance of their business, and Aldibert, Becker & Co., and they only, had a right to look to the defendants for payment. There the forwarder delivered the goods and sued for the carriage, etc. Here the defendants refused to deliver the goods, and insisted on their right to a lien. The principle involved, however, is the same in both cases, if it be admitted that there must be a debt to sustain a lien.

Finally, on a full and careful consideration of this case, we arrive at the following conclusions: 1. That a common carrier is bound to receive and carry goods only, when offered for carriage by their owner or his authorized agent, and then only upon payment for the carriage in advance, if required; 2. If a common car-

rier obtains the possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value; 3. To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between the owner and the carrier, so that an action at law might be maintained for the payment of the debt, sought to be enforced by the lien.

The facts set forth in the special verdict found in this case, do not bring it within the principles which justify the lien claimed by the defendants, and, therefore, judgment for the plaintiffs must be entered upon the verdict, for their damages for the detention of the goods replevied, and for their costs.

RIGHT OF CARRIER TO DETAIN GOODS AGAINST OWNER, WHEN POSSESSION WAS NOT RECEIVED FROM HIM.—The principal case is the leading one upon this subject. The others bearing upon the same point, decided in this country, are *Van Buskirk v. Purinton*, 2 Hall, 561; *Collman v. Collins*, Id. 569, and *Robinson v. Baker*, 5 Cush. 137. The doctrine of all these cases is that of the principal case. In *Van Buskirk v. Purinton*, *supra*, and *Collman v. Collins*, Id., the case presented was, that property sold on a condition which had not been complied with, had been shipped on board of defendant's vessel, and that the latter asserted a right to detain the goods against the conditional vendor, for the amount of his freight charges; but the right was denied, and plaintiff allowed to recover the value of the goods in an action of trover.

In *Robinson v. Baker*, *supra*, a carrier to whom goods had been delivered, without the assent, express or implied, of the true owner, claimed a right to detain the same, against the latter, until the freight charged by him for the transportation thereof had been paid. This right of detention was again denied. After referring to the principal case, and to the cases from Hall's reports, cited above, the court say: "Thus the case stands, upon direct and express authorities. How does it stand upon general principles? In the case of *Saltus v. Everett*, 20 Wend. 267, 275 [32 Am. Dec. 541], it is said: 'The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title can not hold against the true proprietor.' There is no case to be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading, not given by himself, but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation or work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent. * * * Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrong-doer. He is only bound to receive goods from one who may right-

fully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight, or pay for the carriage, is first paid to him; and he may in all cases secure the payment of the carriage in advance." This reasoning is identical with that adopted in the principal case.

The above cases are opposed, of course, to the case of the Exeter carrier, cited in *Yorke v. Greenough*, 2 Ld. Raymond, 866, and so fully detailed in the principal case. They are also opposed to a *dictum* in the case of *King v. Richards*, 6 Whart. 418; S. C., 37 Am. Dec. 422. But that *dictum* was entirely uncalled for, as the principle decided in that case, and the only one necessary to be decided, was, that a carrier might defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods.

BEACH v. BOTSFORD.

[1 DOUGLASS, 199.]

A JUDGMENT ENTERED BY A JUSTICE BY VIRTUE OF A STATUTORY AUTHORITY must show that the requirements of the statute have been complied with, and if it fails in this is void.

STATUTORY REQUIREMENT OF WITNESSES TO THE EXECUTION OF AN INSTRUMENT means subscribing witnesses.

ENTRY OF PAYMENT OF A JUDGMENT MADE BY A JUSTICE OF THE PEACE upon his docket, in his official capacity, is *prima facie* evidence of the fact of payment, and to justify an execution issued at a subsequent date, the party claiming under the execution must show that the entry was erroneous.

ENTRIES MADE BY A JUSTICE UPON HIS DOCKET, apparently in his individual capacity, and explanatory of prior entries made in his official capacity, as, for instance, of a prior entry of payment of judgment, are not evidence in themselves, and can not be heard to control such prior entries.

A MINISTERIAL OFFICER CAN NOT DEFEND UNDER PROCESS FAIR UPON ITS FACE ALONE, where the object of the action to which he is defendant, is, as in replevin, but to recover possession of the goods, seized under the process; he must, in all such cases, in addition to the process, show by the production of a valid judgment, that the court which issued it had authority to do so.

REPLEVIN for the taking and detention of a span of horses. The taking, the detention, and the property of plaintiff were admitted upon the trial by the plaintiff in error, defendant below. He, however, attempted to justify by showing that the horses were seized by him, in his capacity of constable, under an execution issued against plaintiff by Amos Mead, justice of the peace, reciting a judgment obtained against the plaintiff, by William McDermott, before John Hovey, the predecessor in office of Mead. No attempt, however, was made by him to introduce in evidence the judgment upon which the execution

issued. Plaintiff, after the evidence above detailed had been introduced by defendant, read in evidence to the jury the following entries from the docket of John Hovey, justice of the peace:

"Wm. McDermott v. Lemuel Botsford. I hereby confess judgment in favor of plaintiff, for the sum of ninety dollars, due on money lent, to be stayed three months and no longer, and costs of suit.

LEMUEL BOTSFORD.

"Judgment rendered in accordance with the above confession, Nov. 26, 1840. Damages, ninety dollars. Justice's fee, fifty-eight cents. Judgment, ninety dollars and fifty-eight cents.

"The within judgment for damages and costs, paid this sixth day of February, 1841.

JOHN HOVEY, J. P."

This last entry was written across the face of the first, and below it was another entry to the effect that it was to be considered null and void because procured by fraud, and because the money was removed from Hovey's hands after payment, without his authority, by Myron Botsford, defendant's agent. This indefinite entry was signed "John Hovey," without an addition indicative of his official character. The jury was instructed that it must find for plaintiff if the judgment was satisfied at the time that the execution issued, and that the entry of the justice upon his docket that his previous entry of payment was null and void must be disregarded; and that it must also find for plaintiff if the entry of the judgment was not in compliance with the statute.

George W. Wisner, for the plaintiff in error.

A. H. Hanscom, *contra*.

By Court, MORELL, C. J. The defendant below, having proved that he took the property by virtue of a legal execution, insists that it is a sufficient justification for the officer, without producing and proving the judgment on which the execution issued. No objection appears to have been made by the plaintiff below, on the trial, to the proof of the execution, without proof of the judgment. He subsequently, however, proved the judgment himself; and he contends: 1. That the judgment was void, not having been entered in pursuance of the provisions of the statute: R. S. 389, sec. 2. 2. That it appears from the docket of the judgment, that it had been paid previous to the issuing of the execution.

1. The statute, R. S. 389, sec. 2, authorizes a justice of the

peace to enter judgment by confession, "provided such confession shall be in writing, and signed by the person making the same, in presence of the justice and one or more competent witnesses." The justice derives his authority to enter the judgment solely from the statute, and the confession of judgment should show that the statute was complied with. It does not appear from the entry of the judgment, that the confession was written and signed in the presence of the justice, and one or more competent witnesses. Although the statute does not say that the justice and the witnesses shall subscribe their names as witnesses, still, no person can be a witness to the execution of a written instrument, without subscribing it as such; and it was clearly the intention of the legislature that the witnesses should so subscribe. The statute not having been complied with, the judgment was a nullity: *Tenny v. Filer*, 8 Wend. 569. The consent of the party can not make a void judgment valid: *Id.* The justice, therefore, had no jurisdiction over the person of the defendant.

2. Admitting the judgment to have been valid, if it had been paid, the justice had no power to issue the execution upon it. On the sixth day of February, 1841, the justice, in his official capacity, made an entry on his docket, that the judgment for damages and costs was paid. This was *prima facie* evidence that the judgment had been paid and satisfied, and no execution could subsequently issue on the judgment, without showing that this entry was erroneous. The subsequent entry, made by John Hovey, in his individual capacity, and without date, was not evidence in itself. If the plaintiff below placed any reliance upon it, testimony should have been introduced to explain it. None was offered, and the judge was right in directing the jury to disregard it.

But the plaintiff in error insists, that notwithstanding the judgment may be void, or may have been paid, still, the execution is a perfect justification to the officer, and that it is not necessary for him to produce the judgment upon which the execution was founded; and he relies upon the case of *Savacool v. Boughton*, 5 Wend. 170 [21 Am. Dec. 181]. This case was an arrest of the person; and it was held that "a ministerial officer is protected in the execution of process, whether the same issue from a court of limited or general jurisdiction, although the court have not, in fact, jurisdiction of the case, provided, that on the face of the process it appears that the court have jurisdiction of the subject-matter, and nothing appears to

apprise the officer, but that the court also has jurisdiction of the person of the party to be affected by the process."

In *Earl v. Camp and Stone*, 16 Wend. 562, which was trespass for taking from his possession property which the plaintiff had, as a constable, levied upon by virtue of a writ of attachment issued by a justice of the peace, and which process the court held to be void, the court say: "It is insisted that the plaintiff, being a ministerial officer, should be protected by his process, which was fair on its face, though the magistrate wanted jurisdiction; and so, indeed, he should, within the case of *Savacool v. Boughton*, 5 Id. 170 [21 Am. Dec. 181], and various other cases decided by this court: *McGuinty v. Herrick*, 5 Id. 240, 243. *Wilcox v. Smith*, Id. 231 [21 Am. Dec. 213]; *Reynolds v. Moore*, 9 Id. 35, 36 [24 Am. Dec. 116], *per* Sutherland, J.; *Alexander v. Hoyt*, 7 Id. 89; *Coon v. Congden*, 12 Id. 496, 499; *Rogers v. Mulliner*, 6 Id. 597 [22 Am. Dec. 546]. These cases go the utmost length, and the true length, in the protection of ministerial officers." "In general they ought not to look beyond the process, and in no case need they do so. The duty is usually to arrest the person, or to take the goods of another, the latter of which is to be followed by a sale. *Savacool v. Boughton* was an arrest of the person. *Alexander v. Hoyt*, *Reynolds v. Moore*, and *Coon v. Congden* are cases of goods seized and sold. Our later cases are full and pointed upon the want of jurisdiction in respect to subject-matter; and the principle upon which they go is equally applicable to a want of jurisdiction over the person. Accordingly the collector of a militia fine was protected, though the delinquent was exempt from military duty: *Fox v. Wood*, 1 Rawle, 143." "Wherever there is jurisdiction of the process, the law means to make the officer safe in yielding implicit obedience. Even the justice who issued his warrant against a resident freeholder, without previous summons or oath, was, in *Rogers v. Mulliner*, 6 Wend. 599 [22 Am. Dec. 546], protected within this principle."

"But the rule is one of protection merely; and beyond that is not meant to confer any right. The armor which it furnishes, is strictly defensive. It is personal to the officer himself; and can not be used to confer any right upon the wrong-doers, under color of whose void proceedings he is called upon to act. Suppose he goes on and makes sale of the property levied upon; even the innocent purchaser takes no right. To perfect his title, he must show a valid judgment; a solid foundation for the process. This is emphatically so of the party who instituted the

proceedings." "In no case where an officer becomes satisfied that there is a want of jurisdiction, is he bound to act in any way. He has a discretion, if he choose to exercise it; and if he refuses in the first instance, the party can not make him accountable. In *Albee v. Ward*, 8 Mass. 79, the officer had made an arrest, and suffered an escape upon a justice's execution, whereby the plaintiff lost his debt. In an action for the escape, though the execution was fair on its face, and imported jurisdiction, yet the officer was allowed to protect himself by showing that it was issued without authority. Yet the court allowed that it furnished a complete protection against an action of trespass. This is following out the long-settled distinction laid down by Hale, C. J., in *Anonymous*, 1 Vent. 259; and which was adjudged in *Squibb v. Hole*, 2 Mod. 29; S. C., 1 Freem. 129. The same distinction is laid down *obiter*, by Parsons, C. J., in *Dillingham v. Snow*, 5 Mass. 558, with respect to a collector of taxes." These cases establish the principle, that a ministerial officer is protected by his process, which is fair on its face, although the magistrate wanted jurisdiction, if he is proceeded against as a tortfeasor; but in no other case will it protect him, unless he shows a valid judgment.

This is an action of replevin, and the proceedings are *in rem*. The person found in possession of the property, is not called upon to respond in damages as a trespasser, for the value of the property; he is merely summoned to appear and answer the plaintiff for the unjust detention of the property. The issue to be tried is, who had the right of property. The question does not arise whether the defendant was a trespasser or not, as the property which the officer has levied upon, is not held by him for his own benefit, but for that of the party for whom he acts. "It is for every substantial purpose, his action; and if it be obvious he has no right, it necessarily follows that the officer has none. The latter comes *en autre droit*, and must stand or fall upon the claim of his principal: *Per* Spencer, J., in *Hotchkiss v. McVickar*, 12 Johns. 403, 408. It is not logical in any sense for him to say, 'I am privileged in an act of force, which I do suddenly, according to the command of my writ. The law will protect me in obeying the process which it has authorized another to create; therefore, I acquire a property; nay, another, a wrong-doer, shall take an interest or property, in virtue of that act.'" *Brooks v. French*, 5 Wend. 568. Who is to take the money assessed for the value of the goods, if the right of property should be found in the defendant? Not the party who

caused the execution to be issued; for his judgment was void or had been paid; and if paid, it must remain a godsend to the officer; no person could receive it out of his hands.

In all cases of replevin, I have always considered the rule well settled, that if a party claimed to hold the property by virtue of a levy under an execution, he must in the first place show a valid judgment for the foundation of that execution, in order to sustain his right to the property. In this case, although the defendant did not introduce the judgment, which he was bound to do, before he introduced his execution, still, the plaintiff having done so, it would have supplied that defect in the proof (as there were no objections made to the execution), if it had been a valid judgment. But it having been shown that the judgment was void, and if not, that it had been paid, the execution, though regular on its face, was also void, and formed no defense for the officer.

Judgment affirmed.

A JUSTICE MUST STRICTLY PURSUE THE REQUIREMENTS of the statute authorizing him to enter judgment by confession, and the facts necessary to give him the jurisdiction to enter such judgment must affirmatively appear from the proceedings, or the judgment will be void: *Wilson v. Davis*, 1 Mich. 160; *Shadbolt v. Bronson*, Id. 89; *Spear v. Carter*, Id. 22; *Allen v. Carpenter*, 15 Id. 32, citing the principal case.

PROCESS VALID UPON ITS FACE, though it may be sufficient to protect the officer who has acted thereunder, when proceeded against as a wrong-doer, is no protection to him where, as in an action of replevin, the only object sought is the recovery of the goods seized thereunder, unless he may show that the process was either authorized by a prior valid judgment or otherwise: *Adams v. Hubbard*, 30 Mich. 105; *Le Roy v. East Saginaw City Railway*, 18 Id. 239, citing the principal case. A reference to the note in *Savacoe v. Boughton*, 21 Am. Dec. 207, will show that this distinction is well sustained by the authorities.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

PLANTERS' BANK v. NEELY.

[7 HOWARD, 80.]

A REHEARING CAN NOT BE GRANTED AFTER THE TERM in which a decree was pronounced. A bill of review is then the proper remedy.

THE GRANTING OF AN APPEAL AND ITS SUBSEQUENT PERFECTION DIVEST THE COURT BELOW of all jurisdiction, and it can not afterwards set aside the order from which the appeal has been taken. The loss of the bill of exceptions embodying the testimony upon which the appeal is founded, does not avoid this rule.

FRAUD IN AN ADMINISTRATOR, tending to defeat the ends of his trust, renders his acts void, and they will be set aside at the instance of any party in interest, where the application has been made at the earliest opportunity, and before any rights have accrued to innocent third parties.

IDEM.—PURCHASER AT AN ADMINISTRATOR'S SALE, before he has paid the amount of his bid, has acquired no right which will prevent a court from setting aside the sale, where, owing to the fraudulent devices of the administrator, he has been enabled to bid in the property at much below its real value.

ATTEMPT OF ADMINISTRATOR TO SECURE THE PROPERTY to the family of the decedent at an under-price, by discouraging bidding at his sale thereof, is fraudulent; and if so far successful, that at such sale the property is bid in trust for the family at much below its value, the sale will be set aside at the instance of any creditor of the estate to whom damage is thereby threatened.

APPEAL from the probate court of Claiborne county. The opinion states the case.

J. H. Maury, and Montgomery and Boyd, for the plaintiffs in error.

Thrasher and Sellers, contra.

By Court, CLAYTON, J. John G. Neely and wife, as the administrator and administratrix of William King, deceased, procured an order from the probate court of Claiborne county, for the sale of the personal estate of the decedent to pay its debts; and in December, 1840, the sale took place. About fifty-five slaves and other personalty, all of which had been appraised at the aggregate sum of twenty-one thousand two hundred and six dollars, were sold for the sum of four thousand four hundred dollars. At the December term, 1840, of the said probate court, the Planters' Bank filed a petition, alleging that the estate was largely indebted to it, and praying that the sale might be set aside; and at the January term, 1841, the court did set it aside, upon the ground of fraud, collusion, and inadequacy of price. It does not appear from the record that any bill of exceptions was taken at the time, or any appeal prayed. At the following February term, Neely and wife filed a petition for a rehearing, which was granted, and the order made at the previous term, setting aside the sale, was annulled. The petition for a rehearing states that a bill of exceptions, embodying the testimony given in upon the trial at the January term, had been signed by the court, and that they had prayed an appeal, which was granted; but that the day after the adjournment of the court, it was ascertained that the bill of exceptions had been lost, and could never afterwards be found. This allegation was probably the ground on which the rehearing was granted. The cause was continued until the September term of the court, when the sale was confirmed and ordered to be recorded. From this order the case comes by appeal to this court.

As a general rule, a rehearing can not be granted after the term is passed in which the decree was pronounced. A bill of review is then the only remedy: *Hodges v. Davis*, 4 Hen. & M. 400; *Furman v. Coe*, 1 Cai. Cas. in Err. 96; *Dunham v. Winans*, 2 Paige, 24. The loss of the bill of exceptions does not, by any means, afford a satisfactory reason for the granting of the rehearing. An appeal had been prayed and granted, by which, if the then appellants had executed the bond as required by law, the court below had lost all jurisdiction of the cause. What was the course proper to be pursued upon the loss of the bill of exceptions, we will not attempt to indicate; but we are satisfied the one taken was not correct. As there are other grounds, however, on which the judgment will be reversed, we shall not dwell upon this.

An administrator is but a trustee, and the assets a trust fund,

for the creditors and distributees of an estate: 1 Story's Eq. 506; *Cable v. Martin & Bell*, 1 How. 561. Any fraud upon the part of the administrator, which tends to defeat the ends of the trust, will justify the court in declaring his acts void, whenever it can be done without prejudice to the rights of innocent third persons. The title can not pass unless for the purposes and in the manner prescribed by law. The probate court has the power to watch over the execution of its orders; to see that they are not made the instruments of fraud, and, when they are perverted to improper uses, to set aside the acts done under them. This results from the simple elementary principle that the power of all courts to apply the remedy is co-extensive with its jurisdiction over the subject-matter: 4 Kent, 191; *Hershaw v. Thompson*, 4 Johns. Ch. 609. To hold otherwise, when it has been settled that its jurisdiction in matters of administration is ample and exclusive, would be to declare the utter impotence of the law, and to make the avenue to fraud in the administration of estates as broad and beaten as the public highway. But, in the application of the principle, regard must be had to the time when aid is asked, and to the rights of third persons innocently acquired. If, then, there is fraud in this sale, it must be set aside, as the application for that purpose was made at the earliest practicable day, and there are no third persons whose rights conflict.

The evidence in the record will show that Stamps, who acted as the agent of the Planters' Bank, started to the place of sale with an intention to bid for the property, and that he fell into a strange delusion as to the place of the sale. That the petitioners contributed to create that delusion, and to take advantage of it, is most manifest. The testimony is, that Neely, one of the administrators, on the morning of the sale, called at the house of William Briscoe, one of the witnesses, and told him that Stamps was coming down to attend the sale, and that he would probably expect that the sale would take place at his house, and he requested the witness to wait until Stamps came along, to accompany him to his house, to keep him company, and entertain him with a view to prevent his attending the sale. The witness objected to doing so, but Neely insisted on his going to take dinner; this he did. He arrived there about eleven o'clock, found Stamps and William Sims there, and they all remained at the residence of Neely, eating, drinking, and talking until after dinner. Neely returned immediately before dinner, with four

or five others; and after dinner the witness inquired when the sale would take place, and was informed that it was over.

Another witness, William Sims, states that he went to the residence of Neely to attend the sale, and to purchase negroes; that he arrived at his house at a quarter past nine o'clock, and was there all the time that Stamps was. The witness asked Mrs. Neely, the administratrix, at what time the sale would take place. She replied after twelve o'clock. He asked for the negroes, as he wished to see them before the sale; she replied that they were picking out cotton; that they would be there after a while, and that Mr. Neely had either gone or sent for them. He heard Mrs. Neely tell Stamps not to be uneasy or impatient, that the sale would not take place before twelve o'clock, and that she would not take any advantage of him, but what was honorable. Stamps was also offered as a witness, but objected to on the score of interest, and excluded.

Thus it appears it was the plan of Neely to decoy Stamps to his house, and to have him entertained there, till the sale was completed. The witness to whom he applied refused to aid him; yet the plan was carried out. Stamps went to the house of Neely; was kindly entertained by one of the parties; was desired not to be impatient; told that no advantage would be taken of him; kept in the belief that he was at the place appointed for the sale, and detained there under that belief until it was concluded. The witness, Sims, who went to purchase slaves, was induced, by the conduct and conversation of Mrs. Neely, to believe that the sale was to take place at Neely's residence, and was likewise detained there till it was over. If, in all this, there was no assertion of falsehood, there was at least a suppression of truth, which equally violates good faith, and avoids all transactions infected by it. Any subtle machinations, whether in words or deeds, designed to circumvent, amounts to a deceit, which may be relieved against: *Donelson v. Young*, Meigs, 157; Story on Eq. 200, 213.

There are other circumstances of suspicion, of no little weight, in the case. All the property was purchased by one man, at prices about one fifth of the appraised value; the purchaser sets up no claim for himself, but alleges, it is said, that he bought for the children of Mrs. Neely, by her first husband, Mr. King. In many cases, equity will not permit parties to hold property acquired through the fraud of third persons: Story on Eq. 258; *Huguenin v. Baseley*, 14 Ves. 289. Here the purchaser has

parted with no money, and stands just as he did before the sale. It is not possible for the court to wink so hard as not to see the true character of this transaction, and not to perceive in it a contrivance to secure the property to the family, without the slightest regard to the rights of creditors, who had the first claim upon it. The sale could not lawfully commence till after twelve o'clock; it was concluded, the parties concerned in it went a mile, and dined at an hour so early, that after dinner one of the company inquired when the sale would commence. He was informed it was over. Fifty-five slaves, the stock attached to the farm, the crop of corn and fodder, the plantation utensils, and household furniture, were all sold in so short a time that one of the witnesses, after it was over, asked when it would begin. The loss was four fifths of the appraised value, and about the same ratio compared with the advance offered to be made by the Planters' Bank. Such indiscreet haste and ruinous sacrifice demand that a corrective should be applied.

The last order of the probate court will be reversed, and its first order, setting the sale aside, because of fraud, affirmed.

Decree reversed.

PORTER'S HEIRS *v.* PORTER.

(7 HOWARD, 106.)

ANY PARTY TO A DECREE OR ORDER OF THE PROBATE COURT may appeal therefrom.

UPON A PRO CONFESSO DECREE IN THE PROBATE COURT the cause must be set for a final hearing, and a final decree must be entered in favor of complainants only after due and regular proof of their right to recover.

TO A PETITION OR BILL TO OBTAIN DISTRIBUTION OF AN ESTATE, the administrator or executor is an indispensable party, without whom no decree can be properly entered.

BASTARDS ARE NOT INCLUDED BY THE WORD "CHILDREN" in the statute of descents and distributions.

PETITION by Tilleth Porter, in the probate court of Franklin county, to obtain a distributive share in the estate of his deceased mother, Nancy Porter. The facts of the case are set forth in the opinion of Clayton, J.

Boyd and Montgomery, for the appellants.

Webber and Jennings, *contra*.

By Court, TROTTER, J. A preliminary question has been made, whether the appeal be allowable, inasmuch as the administrator

and two of the distributees have not united in the appeal. The law allows to any party who may feel aggrieved, the right to appeal from any order, decision, decree, or sentence of the probate court. From the nature of the answers of the two defendants who unite in the prayer of the petitioner, they are not injuriously affected by the decree. The cause as to them is at an end; the decree does not aggrieve them. The same may be said of the administrator, who is a mere trustee, and as such must stand indifferent as to how the decree goes, or as to who gets the money. As the record stands, this is virtually and really a contest between the petitioner and the appellants. We can, therefore, entertain no doubt that the appeal is allowable. On the merits of the case, there can be no doubt. The answer of the appellants, by denying the heirship of Tilleth Porter, stated a fact, which is of course fatal to the claim urged in the petition. It denies the very ground and foundation of his right as stated in the petition. The demurrer admits the answer to be true. And yet the court not only disallowed the demurrer, but rendered a final decree in favor of the petitioner. This was certainly erroneous. And it was equally improper to make the decree without proof to support the facts on which it was predicated. It is then, as a general rule, that upon a *pro confesso* decree, the court can only set the cause for a final hearing, and make the decree final upon due and regular proof of the right of complainant to recover.

A re-argument having been awarded in this case, Mr. Justice Clayton delivered the opinion of the court at the present term:

This is a petition filed in the probate court of Franklin county, by the appellee, for a distributive portion of the estate of Nancy Porter, deceased, against the administrator of her first administrator, and her heirs at law. The defense set up is the illegitimacy of the petitioner; and the want of proper parties. There was no proof taken in the cause; five of the parties, who are the present appellants, deny the claim of the petitioner; two of the parties were willing to grant the petition, admitting the subsequent intermarriage of the ancestors, and their recognition of the petitioner. The administrator of the first administrator paid no attention to the cause, and the petition was taken for confessed against him, and a decree entered in favor of the petitioner.

The first inquiry is, whether there is not a want of proper parties, because there is no representative of the estate of the dece-

dent before the court. The statute under which this proceeding is had, enacts that "any person entitled to the distribution of an intestate's estate, may petition the court of the proper county, setting forth his claim, whereupon it shall be the duty of the court to grant a rule upon the administrator to make the distribution agreeably to law:" How. & Hutch. 406, sec. 70. From the terms of this act, it would seem that the administrator of the estate sought to be distributed is an indispensable party; and when plenary proceedings are had, it is equally important to have him before the court. The same rule obtains in a court of equity. In some cases it has been held sufficient, under certain circumstances, to make the administrator alone a party—though more generally all the distributees are requisite parties; but in every case where distribution is sought, the administrator or executor has been held a necessary party: *Pritchard v. Hicks*, 1 Paige, 270; *Myers v. Wade*, 6 Rand. 448; *Bradford v. Felder*, 2 McCord's Ch. 168; *Farre v. Colden*, 1 Paige, 166; *Davoue v. Fanning*, 4 Johns. Ch. 199. So far does this rule extend, that distributees can not sue an executor *de son tort*, without having an administrator *de bonis non* as a party, because a recovery by the distributees would leave him still liable to the demand of the administrator *de bonis non*: *Frazier v. Frazier's Executors*, 2 Leigh, 649. Hence it appears there were not proper parties before the court, to authorize the decree which was rendered; and for this reason the case must be reversed.

Upon the other point, also, the decree is erroneous. The simple question is, whether bastards are comprehended under the word children, in our statute of descents and distributions. At the time of the passage of that statute, the same words in the English statutes on the same subject had received a fixed and established construction. Even before the statutes of Charles II., it had been held that "those who were born from an illegal connection, were not numbered among children:" Co. Lit. 3, b. From the time of Elizabeth the word children in a will, where there were both legitimate and illegitimate children, had been held to mean the legitimate only: See *Beachcroft v. Beachcroft*, 1 Madd. 430; 1 Bl. Com. 378, 379. It was well known that under the English law illegitimates could not take property by descent, derived either from the father or the mother; that they were of the blood of no one; could be heirs of no one; and could not be the stock through which consanguinity could be traced: Bl., *supra*. With the English statute before it, and with a full knowledge of the construction it had received, our legislature

re-enacted it, without manifesting the slightest intention to change the rule of construction so established. This is a strong reason for adhering to the rule. By the same statute a case is provided for in which a child born out of wedlock may be rendered legitimate; that is, upon the marriage of the parents and recognition of such issue. This was a change of the English law, and goes to prove that with this addition, they intended that law to remain unaltered.

This point came before the supreme court of the United States, upon the construction of a similar statute in Virginia. The court says: "As bastards, they were incapable of inheriting the estate of their mother; the current of inheritable blood was stopped in its passage from and through the mother, so as to prevent the descent of her property and that of her ancestors, either to her own illegitimate children, or to their legitimate offspring." *Stevenson's Heirs v. Sullivan*, 5 Wheat. 207; 4 Con. 641. This seems also to accord with the prevailing exposition of similar statutes in the United States: *Cooley v. Dewey*, 4 Pick. 93 [16 Am. Dec. 326]; *McCormick v. Cantrell*, 7 Yerg. 615; *Drake v. Drake*, 4 Dev. 110; *Jones v. Burden*, 4 Desau. 440; *Little v. Lake*, 8 Ohio, 289. In Connecticut, the contrary has been decided: *Heath v. White*, 5 Conn. 228; but this case is overborne by the others just cited. It is the policy of the law to sustain the institution of marriage, as the surest and safest groundwork on which society can rest, and to make that the only source from which inheritable blood can flow.

It is urged in argument, that Tilleth Porter was rendered legitimate by the marriage of his parents, and subsequent recognition. There is no proof of that fact in the record, nor any mention of it, except in the answer of two of the defendants. Their admission can not affect the rights of their co-defendants; and it is unfortunate if the proof exists, that it was not made. The *pro confesso* against Byrd, the administrator of the first administrator, can have no effect, because he does not represent the estate of Nancy Porter, nor does he appear to have any interest of any kind in the subject-matter.

The decree will be reversed, and the petition dismissed.

ILLEGITIMATE CHILD could not, at common law, inherit his father's estate: *Sneed v. Irving*, 22 Am. Dec. 41.

CONNER v. ROUTH.

[7 HOWARD, 176.]

A NOTE EVIDENTLY PAYABLE AT SOME TIME AFTER DATE can not be declared upon as a note payable on demand, though by reason of the omission of certain words, the exact time of payment can not be determined. So where a note is payable "twenty-four after date," it can not be declared upon as a note payable on demand.

WHERE THE WORD "MONTHS" IS OMITTED IN A NOTE, so that upon its face no time of payment is indicated, the omission may be supplied by the holder, and the alteration so effected will not vitiate the note.

IDEM.—A NOTE IN WHICH THE WORD "MONTHS" HAS BEEN SUPPLIED by the holder, in order that it may indicate some time of payment, may be read in evidence to the jury without further evidence that that was the word intended, in support of a declaration where the note is declared upon as one payable so many "months" after date.

ASSUMPSIT. The opinion states the case.

B. D. Howard, for the appellants.

Vanwinkle and Potter, contra.

By Court, CLAYTON, J. This was an action of *assumpsit* upon a promissory note in which there is an omission of some word that would express the time when it is payable. It reads, "twenty-four after date," not saying whether days, months, or years were intended. The declaration avers that months were intended. Upon the trial the defendants objected to the reading of the note to the jury. The plaintiff then offered to explain the ambiguity by a witness, but the court suffered the note to be read, and refused to hear other evidence. To this the defendants excepted. Verdict and judgment were rendered for the plaintiff, and the case comes by appeal to this court. It is urged that the note should have been excluded, because it was by law a note payable on demand, and therefore varied from the note described in the declaration. When no time of payment is fixed in a note it is payable on demand: *Lobdell v. Hopkins*, 5 Cow. 517; *Thompson v. Ketcham*, 8 Johns. 192 [5 Am. Dec. 332]. But this is not a note of that kind. It is evidently payable at some time after the date, either days, months, or years. The holder could not disregard its words and go for immediate payment. He might have filled it up with the time really intended, and which had been omitted by mistake, and such alteration would not vitiate: Chit. on Bills, 206, 207. But surely if the plaintiff had declared as upon a note payable on demand, this note could not have been read in support of the allegation.

If the court had thought the note was void for uncertainty, then it should have been withheld from the jury. We do not think that it was void. Words are often supplied to carry out the reasonable intention of the parties; and in pleading the instrument is described as if it contained the omitted words. In one case the word pounds was supplied: *Coles v. Hulme*, 15 Com. L. 568; in another the word hundred: *Waugh v. Bussel*, 1 Marsh. 311; in another the name of the bargainor: *Lloyd v. Lord Say and Sele*, 1 Bro. P. C. 379; and in another the name of the obligee: *Langdon v. Goole*, 3 Lev. 21. See *Kincannon v. Carroll*, 9 Yerg. 11 [30 Am. Dec. 391]. In *Boyd v. Brotherson*, 10 Wend. 93, a note was intended to be made for eight hundred dollars, but by mistake the two latter words were omitted. The note was indorsed, and afterwards altered by the maker by the insertion of those words. In an action against the indorser, the question as to the sum intended to be inserted was submitted to the jury; and upon the testimony of the maker they found for the plaintiff.

In this case the issue was for the jury to determine. The averment that the note was payable twenty-four months after date, had to be proven to their satisfaction. The note was a necessary link in the chain of evidence, and was properly permitted to go before them. They were satisfied of the truth of the averment, and we see no reason to disturb their finding.

Judgment affirmed.

MERRILL v. MOORE'S HEIRS.

[7 HOWARD, 271.]

STATUTORY CONSTRUCTION.—COMPENSATION OF AN EXECUTOR OR ADMINISTRATOR MUST BE DETERMINED BY REFERENCE to the value of the estate administered upon, where part thereof may have escaped appraisement, notwithstanding the statutory direction that such compensation shall be a percentage upon the appraised value of the estate.

THE TIME OF ALLOWANCE OF COMPENSATION to an executor or administrator should be upon the final settlement of the estate.

APPEAL from the probate court of Adams county. Appellant is the administrator with the will annexed of the estate of Robert Moore, deceased. The appraised value of the estate was twenty-six thousand three hundred and fourteen dollars. During the period of his administration, appellant raised two crops upon the real estate of the deceased, and finally obtained an order for its sale. The entire amount

accounted for by him was ninety-four thousand eight hundred and sixty-three dollars. Upon the rendering of his final account, the court below decreed in the matter of the compensation of the administrator, that he be allowed ten per cent. upon the appraised value of the estate; the allowance to be made as of the date of the final settlement. From this order the administrator appealed, contending in this court not only that he was entitled to commissions in proportion to the value of the estate administered upon, but also that such commissions should have been allowed upon the amounts accounted for by him in his prior settlements with the probate court, as if of the times when such settlements were made.

Quitman and McMurran, for the appellant.

Montgomery and Boyd, contra.

By Court, CLAYTON, J. Two questions are presented for our determination: 1. What shall be the measure of compensation to an executor or administrator? 2. And when shall that compensation be received?

The decision must rest upon a fair construction of our statutes. One of the first duties of an executor or administrator is, to make an inventory of the goods, chattels, and credits of the deceased. Appraisers are to be appointed by the court at the time the letters are granted, whose duty it is to appraise the goods, chattels, and personal estate of the deceased; their return of this, together with the return of the administrator usually contained in one instrument, constitutes the inventory and appraisement. In addition to this, the administrator should return an account of the money on hand, and a list of the debts due to the estate; these form the credits, which are not required to be appraised, for very obvious reasons. After the return of the first inventory, if other assets come to his hands, it is his duty to make return of them. If it be requisite to sell the real estate, the probate court may grant him leave to do so, and he must report the amount and terms of sale to the court. In this last instance no appraisement is directed—the sale itself is the appraisement. This is a summary of the duties of the administrator, and it will be seen that much of his duty, and often the most intricate and laborious part, relates to portions of the estate which are not required to be appraised.

The two sections which relate to the compensation of the executor or administrator, are the ninety-sixth and one hundred and first of the law in regard to the estates of decedents: How.

& Hutch. 414, 415. The former is in these words: "In all cases the court shall allow to an executor, or administrator, or collector, on the final settlement of his or her account, such compensation as shall appear to said court reasonable and just, for his or her trouble in administering the estate of the testator or intestate, not less than five nor exceeding ten per cent. on the amount of the appraised value of such estate." The other section is almost in the same language, but it directs the allowance to be not less than one nor more than ten per cent. on the appraised value.

Does this language so limit the allowance to the administrator that it can be made only on that part of the estate which is appraised? Other portions of the estate which are not required to be appraised, but which must be administered, are equally within the reason, spirit, and intention of the law. A case now in this court forcibly exemplifies the injustice of confining the compensation to a commission upon the appraised value of the estate. The estate has been in the hands of the administrator for many years; its appraised value, besides some fifteen or eighteen slaves, was less than five hundred dollars; the amount of assets, exhibited on the final settlement, exceeds one hundred and fifty thousand. This increase does not result from a defective inventory in the first instance, but from a gradual increase of the property under careful management. To give the administrator ten per cent. on the original appraised value of this estate, as his compensation, would look like a mockery of justice. It is wrong to impose onerous duties upon men, and to deny them compensation for their discharge. Such a rule would tend strongly to make them negligent in the performance of the trust, or to make them seek indemnity in some other way. We believe that the words "appraised value," were intended to cover the whole estate administered, and were thought to do so at the time.

We think, therefore, that the allowance in this case should be made to extend to the whole estate administered, as evidenced by the several inventories and accounts rendered by the administrator from time to time, in which he has charged himself with the amounts which have come to his hands. It should not be confined to that portion of the estate which has been appraised, and the administrator forced to a gratuitous administration of the balance. This allowance, however, can only be made upon the final settlement of the estate, and should stand as a credit to the administrator as of that date. The same principle and rule are

applicable to the administration of Merrill upon the other estate of James Moore, which is incidentally connected with that of Robert Moore. The same decision is made in reference to it. These seem to be the only points on which the opinion of this court is sought.

The decree of the probate court will be reversed, and the cause remanded, with directions to that court to allow the administrator as compensation such commission, not less than one nor more than ten per cent., as shall seem to said court reasonable and just, upon the whole amount of assets administered, not merely the appraised value; but the allowance to be made as of the date of the final settlement.

Judgment reversed.

ELLIS' ADM'R v. COMMERCIAL BANK OF NATCHEZ.

[7 HOWARD, 294.]

THE HOLDER OF A BILL WHO HAS PLACED NOTICE OF PROTEST IN THE POST-OFFICE in due time, is not responsible for any defects in the regulation of the mails, or for the time which may elapse between the deposit of the notice and its delivery.

THE POST-MARK UPON AN ENVELOPE IS NOT CONCLUSIVE EVIDENCE of the time of its deposit in the post-office; it may be shown that the deposit was made at a time different from that which the post-mark would indicate.

THE AGENT OF THE HOLDER OF A BILL, TO MAKE A DEMAND, is entitled to one day, to give notice to his principal of a default; and the latter is entitled to one day after he receives the notice, to give, or forward notice by mail, to the drawer or indorser.

PROTEST BY A NOTARY MUST BE BASED UPON A DEMAND made by himself; it is not sufficient that the demand was made by his clerk.

ASSUMPSIT. The opinion states the case.

Quitman and McMurran, for the appellant.

McDonald and Matthewson, contra.

By Court, CLAYTON, J. This was an action of *assumpsit*, brought against the appellants by the appellee, upon two bills of exchange, indorsed by their intestate. One of these was for five thousand dollars, payable in New Orleans; the other was for two thousand dollars, payable in Philadelphia. Several questions, applicable to each of these separately, grew out of the instructions asked of the court. Those in regard to the larger bill, will be first considered. The defendants, by their counsel, asked the court to instruct the jury, "that the post-

mark on the envelope is evidence of the time when notice was mailed in the post-office." This the court refused to do. A charge had been before given at the request of the plaintiff, and without exception on the part of the defendants, that "if the notary put the notice in the New Orleans post-office on the day or day after the bill was protested, he discharged his duty; and the fact that it was detained in the post-office there, does not discharge the indorser." The testimony of the notary was, that he had placed the notice in the post-office at New Orleans, on the day of the protest of the bill. If by the term "mailed," as used in the charge asked for, is meant the time when a letter is started from the office in which it is deposited, the instruction was correctly refused, because that is not the point of inquiry, and in a case like this, it was a mere abstract proposition. If the holder of a bill places the notice of protest in the proper office in due time, it is legal diligence, and he is not responsible for any defects in the regulation of the mails, or for the time which elapses from its deposit in the office and its delivery: *Dickins v. Beal*, 10 Pet. 579. But if by that term was meant the time when the letter was deposited in the office, it was not evidence of that fact, except by inference and presumption. In the charge given at the instance of the plaintiff, the jury had been told at what time the letter must be put in the office in order to render the defendant liable; they had the letter and post-mark before them, as well as the evidence of the notary, and it was for them to decide upon the whole testimony. The charge asked by the defendant would seem intended to exclude other evidence, and to make the post-mark the sole proof of the fact. For the reason that a correct charge had already been given, the one under consideration was properly refused.

The next ground of exception grows out of the refusal of the court to charge the jury "that if the bill was the property of the plaintiff, and was sent to New Orleans for collection, and there protested, it was the duty of the notary to address notices directly to the indorser at his residence." The doctrine is well settled that an agent of the holder is allowed one day to give notice to his principal of a default, and the principal to one day after he receives the notice to give or forward notice by mail to the drawer or indorser: 3 Kent, 108; *Buller v. Duval*, 4 Yerg. 265; *Coll v. Noble*, 5 Mass. 167; *United States Bank v. Goddard*, 5 Mason, 366. There is no distinction as to the point of notice whether the party who causes the bill to be protested be a holder in his own right, or in right of another. This charge was there-

fore correctly refused. The other charges asked for by the defendant in reference to this bill were given by the court; and as they were not excepted to by the plaintiff, it is not necessary for us to pass upon them. The facts out of which those charges grew were no doubt considered by the jury to be in favor of the plaintiff. This disposes of the points in regard to the larger bill, and there is no error injurious to the appellant, or of which he can complain so far as that bill is concerned.

The first instruction asked by the defendant as to the other bill, was, "that the demand must be proven to have been made by the notary; proof of demand made by the clerk is not sufficient." This was refused. The evidence left it in doubt by whom the demand was made; the point was therefore material. The court erred in refusing to give this charge: the bill being a foreign one: *Carmichael v. Bank of Pennsylvania*, 4 How. 567 [35 Am. Dec. 408]. The statute likewise contemplates that the duties of the notary should be performed by him in person, and that his certificate should rest upon his own knowledge, not upon information furnished by others: How. & Hutch. 373. If in this case the demand and protest should be made in accordance with the laws of Pennsylvania, because the bill is made payable there, the laws of that state in that particular are like our own so far as we have any information: See *Stewart v. Alison*, 6 Serg. & R. 324 [9 Am. Dec. 433]; *Jackson v. Newton*, 8 Watts, 401; Chit. on Bills, 489.

The only remaining question is, whether the act of the notary or his clerk amounted to a demand, or furnished an excuse for the want of it. The proof is that "he went to the counting-house of the acceptor, found it shut up, and no person there to answer for the payment:" the bill was then protested. In nearly all the cases which we have been able to find on this point, after a very diligent search, the evidence shows that inquiry was made in the neighborhood for the maker or acceptor, when he was not found at his dwelling or place of business, and thus an excuse for want of personal demand is furnished: *Galpin v. Hard*, 3 McCord 394 [15 Am. Dec. 640]; *Shed v. Brett*, 1 Pick. 401 [11 Am. Dec. 209]; *Hine v. Alley*, 1 Nev. & M. 433; Bayley on Bills, 198; Chit. on Bills, 398. In *Collins v. Butler*, 2 Stra. 1087, it was held that finding the house shut up, was not in itself a sufficient excuse for want of presentment. See, also, the case of *Stewart v. Eden*, 2 Cai. 150. But as this case will be reversed upon another ground, it is not necessary for us now to decide this point; we therefore withhold the expression of any opinion upon it.

For the error in refusing to charge that the plaintiff must show that the demand was made by the notary himself, otherwise his protest is not evidence of the demand, the judgment will be reversed.

Judgment reversed and new trial awarded.

See *contra*, *Fish v. Jackman*, 36 Am. Dec. 769, where it is said that an agent to make a demand is not entitled to a day before giving notice to his principal, but that he may wait until the departure of the next mail. That case, however, recognizes that the proper course of the agent is to notify his principal, and not the indorsers of the note, and that the principal, after receipt of this notice, has one day within which to notify the other parties. See also cases cited in note to that case.

NOTARY CAN NOT BASE A PROTEST upon a presentment made by his clerk: *Carmichael v. Bank of Pennsylvania*, 35 Am. Dec. 408.

CARTWRIGHT v. CARPENTER.

[7 HOWARD, 323.]

- A PERSON WHOSE FALSE REPRESENTATIONS HAVE INDUCED ANOTHER to a certain line of conduct, is liable to the latter for the loss he has thereby incurred, and must make good such representations.
- A JUDGMENT PROCURED IN AN ACTION PROSECUTED IN THE NAME of the covenantee, by one to whom the benefit of the covenant has been assigned, is evidence between such covenantee and assignee, and may be used by the latter to show that the representations of the former as to the existence of any claim by him against the defendant in the action were false.
- AN ASSIGNEE MAY RECOVER FROM HIS ASSIGNOR the costs expended by him in the prosecution of an unfounded claim, falsely represented by the latter to be valid.

ASSUMPSIT. Appellant leased a house to one Rowan, by an indenture, in which the latter covenanted to leave the tenements in as good repair as he received them. The Carpenters, the appellees, having, after the expiration of the lease to Rowan, applied to appellant to employ them to repair the house, were shown by him the lease to Rowan, and were told that the latter had not complied with his covenant as to repairs; and that were they willing to make the repairs that should have been made by Rowan under his covenant, and look to him for their remuneration, they might do so. The Carpenters ultimately acceded to this offer of appellant, and proceeded to make the repairs that, according to him, should have been performed by Rowan under his covenant. This work accomplished, a suit was brought by appellees against Rowan on the covenant, in the name of Cartwright. It was understood by the latter, and by the appellees,

that this action was for the benefit of appellees, and its management was undertaken by them. The action failed, because it was now testified that it was shown on the trial that Rowan had complied with his covenant, by leaving the premises in as good a state of repair as he found them. This action was thereafter instituted against Cartwright, to recover the value of the labor performed by appellees. Appellant pleaded the general issue and a plea of payment. Under the latter plea he attempted to prove, as a set-off, an account for costs paid by him in the suit against Rowan. The plaintiffs had verdict. The other facts appear in the opinion.

Quitman and McMurran, for appellant.

Montgomery and Boyd, contra.

By Court, CLAYTON, J. Several charges were asked by the counsel of the plaintiffs to be given to the jury, four of which only seem to call for consideration: 1. If the jury believe that the defendant falsely represented that the repairs to be done on the house leased by Rowan were such as were necessary to put the house in as good repair as when Rowan received it, the defendant will be liable for the work. 2. The verdict and judgment in favor of Rowan in the suit brought by Dr. Cartwright, is conclusive evidence that Rowan was not liable for the repairs charged for in the said suit. 3. The plaintiffs are not liable for the costs of suit brought by Cartwright against Rowan, unless it is proved that they consented to the prosecution of said suit, and such costs are not a proper set-off in this suit. 6. If the jury are satisfied from the evidence that Rowan was not bound by his lease to make the repairs pointed out by Dr. Cartwright, then the transfer of such lease to Carpenter or bringing suit on it for his benefit was not payment for such repairs. There were two other charges which, though excepted to along with these here enumerated, were too obviously correct to require any comment. They were given to the jury.

The first and sixth charges are substantially the same, and may be considered in connection. They propound the simple elementary principle, that if one makes a false representation to another in reference to the subject of contract, he is bound to make the representation good. If one party suffer the other to contract for an article under a delusion created by his own conduct, it will be deemed fraudulent. The defendant showed to the plaintiffs, before the work was commenced, the injuries which he said the house had sustained from Rowan, and which he also

said Rowan, by the terms of the contract, was bound to repair. The plaintiffs did the work, relying upon these representations of the defendant; but the result of the suit against Rowan proved that he was not liable. They acted under a delusion created by the defendant, and it is the part of good faith that he should make good his representations: 2 Kent, 482 *et seq.*; *Anderson v. Burnett*, 5 How. 167; *Parham v. Randolph*, 4 Id. 451 [35 Am. Dec. 403]; *Harris v. Miller*, 1 Meigs, 158 [33 Am. Dec. 188]; *Pasley v. Freeman*, 3 T. R. 57.

The second instruction will be next considered. The chief objection to this is, that it declared the verdict and judgment in the case against Rowan was conclusive evidence that he was not liable for the repairs. The general rule is, that a record of a judgment is evidence only between parties and privies. There is one mode, however, of making them evidence when they would not otherwise be so, by giving notice of the pendency of the suit to a third person whose rights may ultimately be affected thereby. This is applicable between vendee and vendor, assignee and assignor, and in short in all cases in which one will have a right of action for indemnity against another in the event of loss. The person thus notified becomes *quasi* a party: *Kip v. Brigham*, 6 Johns. 158; *Jacob v. Pierce*, 2 Rawle, 204; *Pickett's Ex'r v. Ford*, 4 How. 246; 3 Ph. Ev. 817. This case is within the range of that principle. Cartwright was the plaintiff of record; the suit seems to have been for the benefit of the present plaintiffs. They had, at all events, full notice of it, and attended to its prosecution. Cartwright was an actual and they were constructive parties; the record is therefore evidence between them. There is some conflict in the authorities as to the question whether it was conclusive or only *prima facie*, when simply offered in evidence. The doctrine in the *Duchess of Kingston's Case*, 11 St. Tr. 261, is, "that the judgment directly upon the point is as a plea a bar, or as evidence conclusive between the same parties upon the same matter. Two later English cases tend to fix a contrary rule, and to establish that the verdict and judgment are admissible in evidence, but not conclusive unless pleaded as an estoppel: *Trevivan v. Lawrance*, 1 Salk. 276; *Vooght v. Winch*, 2 Barn. & Ald. 662; 1 Ph. Ev. 321.

In this country the question has been before many of the courts. In Pennsylvania, Maryland, and Tennessee, it is held the verdict and judgment are conclusive, whether pleaded or offered as evidence. In Massachusetts, Connecticut, and Indiana the contrary has been held. In Virginia and New York the decisions are both ways. In this state, in the case of *Pickett's Executors v. Ford*, 4

How. 249, the record was held to be evidence, but whether conclusive or not is not decided. We think the principle that the verdict and judgment are not conclusive, can at most only apply in those cases in which special pleading is requisite, and can not apply to those actions in which almost every matter may be offered in evidence under the general issue. Neither can it apply to cases in which the plaintiff's title is by estoppel, or in which the verdict and judgment are introduced by him to show his right of recovery: See the cases collected and examined, 3 Ph. Ev. 804, 810. But it is not necessary that this case should rest upon the conclusive character of the former verdict. Other evidence to the same point was given, for Rowan expressly swore that he left the place in as good repair as he received it. The whole evidence is set out in the bill of exceptions, and regarding the judgment in the other case as only *prima facie* in its character, this verdict is fully sustained by the proof. As we think justice has been done between the parties, we are not inclined to disturb the finding, and this is in accordance with the rules of law: Gra. New Tr. 357, 407.

The other charge is as to the costs of the suit against Rowan, which the defendant attempted to make a set-off in this case. The instruction given was as favorable for the defendant as is believed to be consistent with the law. As the case stood, he was legally liable for the costs. If he had sued the present plaintiffs for the amount, after having paid them, he would not be entitled to recover, because they were incurred in the prosecution of a claim in which recovery could not be had by reason of his misrepresentation. If the present plaintiffs had been the real parties in that suit, and the costs adjudged against them, they might recover them of the present defendant as part of the damages sustained in consequence of his wrong. An assignee may recover of the assignor the costs expended by him in the prosecution of an unfounded claim: *Butler v. Sluddeth*, 6 T. B. Mon. 542. The same principle comprehends this case. The charges asked by the defendant were all given by the court; the jury were satisfied, it is to be presumed, that the facts did not exist which justified their application.

An objection is urged to the present form of action, and we have no doubt that the form was misconceived. But our statute of jeofails expressly enacts, that no judgment after verdict shall be reversed for any mistake or misconception of the form of action: How. & Hutch. 591.

The judgment will therefore be affirmed.

AN ACTION OF DECEIT WILL LIE wherever one affirms what he knows to be false or does not know to be true to another's loss and his own gain: *Lobdell v. Baker*, 35 Am. Dec. 358, and note, and *Tryon v. Whimmarsh*, Id. 339. It will be seen, by a reference to the note in the latter case, that the action may be maintained though no gain accrued to the person making the representations.

KERSHAW v. MERCHANTS' BANK OF NEW YORK.

[7 HOWARD, 286.]

LEVY UNDER EXECUTION UPON THE PROPERTY of one of the defendants in a joint judgment is *prima facie* a satisfaction thereof.

RIGHT OF ACTION ACCRUES UPON THE LEVY UPON THE PROPERTY of one defendant in a joint judgment against his co-defendant, in the same manner as if he had satisfied and discharged the judgment by a payment in money.

SET-OFF.—WHERE A JUDGMENT HAS BEEN SATISFIED BY A LEVY UPON THE PROPERTY of one defendant, the claim which accrues to him may be set off in an action brought against him by his co-defendant, or by his assignee, where, under the statute, the latter is subject to the same set-offs as the former.

IT IS NOT NECESSARY TO PLEAD THE PRESUMPTION which the law raises from a given state of facts. Thus if a levy is pleaded, the presumption being that the sheriff accomplished his duty by selling the property, it is not necessary to aver the sale.

IT IS NOT NECESSARY FOR A DEFENDANT IN HIS PLEADING TO STATE more than a *prima facie* case.

A PLEA OF SET-OFF, WHICH PROFESES TO GO TO THE WHOLE ACTION, where the amount of the set-off is less than the amount sued for, is demurrable.

ASSUMPSIT on a bill of exchange for seventeen thousand five hundred dollars. The bill was drawn on Kershaw by James H. Claiborne in favor of O. Haring, and was accepted by Kershaw. Subsequently, and before Kershaw received any notice of the assignment of the bill, he became surety for Haring on a forthcoming bond, executed by the latter to obtain possession of his goods from the marshal who had levied thereupon by virtue of an execution in favor of Flournoy. The forthcoming bond was forfeited, and thereupon a *feri facias* having issued, it was levied upon property of Kershaw. By this levy Kershaw contended that he had discharged the judgment against Haring, amounting to sixteen thousand and forty-one dollars. The present action was against Kershaw as acceptor of the bill, and also against the drawer and payee thereof; by the latter of whom it had been indorsed to defendants in error subsequently to its acceptance and before the execution of the forthcoming bond. Kershaw, in a special plea of set-off, pleaded the matters

above set forth, and that at the time he incurred his liability as surety for Haring on his forthcoming bond, he was not aware of the indorsement of the bill, in bar of the whole action. He also pleaded the general issue, with notice that he intended to prove an account for twenty thousand dollars paid to Flournoy as a set-off, and also a note for one thousand three hundred dollars given to him by Haring. The court below sustained a demurrer to the special plea of set-off, and refused to allow proof to be introduced under the general issue in support of the matters specified in the notice. Verdict and judgment for plaintiff.

Eustis, for the plaintiff in error.

McDanold, *contra*.

By Court, SHARKEY, C. J. The important question in this case, and to which our attention has been called by counsel, is as to the sufficiency or validity of the set-off disclosed by the special plea. In the determination of this question, the respective rights of the parties to the action are first to be considered; for the plea, to be available, must show the propriety of the set-off, as well against the plaintiffs below as against Haring.

The statute of set-off provides, that, "if two or more, dealing together, be indebted to each other upon bonds, bills, bargains, promises, accounts, or the like," the defendant may plead payment, and give such indebtedness of the plaintiff in evidence as a set-off: How. & Hutch. Dig. 615. In connection with this, it is necessary to consider another provision, which is in these words: "All bonds, obligations, bills single, promissory notes, and all other writings for the payment of money, or any other thing, shall and may be assigned by indorsement, whether the same be made payable to the order or assigns of the obligee or payee, or not; and the assignee or indorsee shall and may sue in his own name, and maintain any action which the obligee or payee might or could have sued or maintained thereon previous to assignment; and in all actions commenced or sued upon, any such assigned bond, obligation, bill single, promissory note, or other writing as aforesaid, the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and sets-off, made, had, or possessed against the same, previous to notice of assignment, any law, custom, or usage, in any wise to the contrary notwithstanding, in the same manner as if the same had been sued and prosecuted by the obligee or payee therein." Id. 373.

It is insisted by counsel, that domestic or inland bills are

within the last section of the statute referred to, and that the acceptor may avail himself of a set-off, as well to such a bill as he could to a note, under the statute. We do not doubt it. The words "all other writings for the payment of money" must include domestic bills, they being writings for the payment of money. There is, moreover, clear evidence that the intention of this statute was to make a radical change in commercial usage in relation to all negotiable paper. This law is anti-commercial in its character, and the reason of the law applies as well to bills as to notes. If these instruments were subject to different rules, bills would take the place of notes in all cases, and the object of the law would be defeated. The two statutes must be construed together; one establishes a general law of set-off, applicable to all debts; the other, after making all paper for the payment of money assignable, secures the right of set-off up to the time the maker has notice of assignment. Domestic bills are not mentioned in the latter section, and yet they are clearly within the general provision, "all other writings for the payment of money." Bills of exchange and promissory notes are so much alike, and perform so nearly the same office in commercial transactions, that it is impossible to conceive any reason which could justify a belief that any distinction was intended. As between the payee of a bill and the acceptor, it is precisely like a note in all respects.

An inland bill not payable to bearer or to order, is no doubt a negotiable instrument, but it is only so by the operation of this statute; and if it derives a new character from the statute, must it not take all the incidents or consequences? As between the acceptor and holder of a bill, the former is undoubtedly entitled to his set-off against the latter, under the statute of set-off, for any debt which the holder may owe to the acceptor. It is so even in England, where nothing is allowed to embarrass the negotiable character of bills: Babington on Set-off, 17. But may a set-off be pleaded, which accrued at any time before notice of assignment, is the question? The last section referred to does not give any right of set-off which the defendant would not have had by the first section. It only enlarges the rights of the defendant, by allowing him to plead any set-off acquired before notice of assignment. By this statute the maker of a note is protected in any payment made to the payee, or any liability of the payee acquired in good faith, at any time before notice of the assignment of the note. The justice and reason of the law apply with equal force as between the acceptor and

payee of a bill, and we must hold them to be within its provisions. We can not make an exception in the law, which is neither sanctioned by its spirit nor its letter. This view of the subject entitles Kershaw to every set-off as against the defendants in error, which could have been set up against Haring, before notice of assignment, which was on the twenty-fifth of April, 1839. Up to that time, the rights of the parties must be considered precisely as though Haring had been plaintiff in the action. If the offset pleaded would have been good as against Haring, it must also be good as against the defendants in error.

Our statutes of set-off have never, that I am aware of, received a judicial interpretation, as to what description of debts they extend. They are predicated on equitable principles, and entitled to be liberally construed. To come within the statute, the subject of set-off must be a present indebtedness upon contract, express or implied, susceptible of ascertainment in amount. It is held to be a general rule, that a plea of set-off should disclose such a state of facts as would entitle the party pleading it, to sustain his action if he were plaintiff: *Barbour on Set-off*, 170. Did the levy on Kershaw's property, for Haring's debt, bring him within these principles? It is a principle, about which there seems to be no diversity of opinion, that a levy on a sufficient amount of property is a satisfaction of the execution. By the levy the property is changed, and the defendant is discharged, whether the sheriff wastes the property or not. No new execution can issue after such levy, and if it should, it will be quashed for irregularity. Many of the authorities go so far as to say that the judgment is extinguished by the levy: *Ex parte Lawrence*, 4 Cow. 417; *Jackson ex dem. Merrit v. Bowen*, 7 Cow. 13; *Cornell v. Cook*, Id. 310; *Ladd v. Blunt*, 4 Mass. 402; *Hoyt v. Hudson*, 12 Johns. 207. This doctrine was fully recognized by this court in the case of *McGehe v. Handley*, 5 How. 625. To take a defendant's property, is as much a satisfaction as to take his money, and whilst the levy continues, the plaintiff's recourse against the defendant is at an end. Thus in *Dike's Case*, cited 2 Ld. Raym. 1072, it was admitted that a levy would be a good plea for the defendant whose property was taken, in a second suit, although it was held not to be a good plea for the co-obligor sued in a different action, because the goods were not sold. We apprehend the decision in that case would not apply to a joint judgment, as the levy in such case on the property of one satisfies the entire judgment. So in *Mountney v. Andrews*, Cro. Eliz. 237, a levy

was held to be a good plea to a *scire facias* on the original judgment. If the levy should be legally removed, then, of course, the parties are restored to their original rights and liabilities.

Then, on the first of April, 1839, the judgment against Haring and his surety, Kershaw, was *prima facie* satisfied by a levy on the property of the latter. At that time Kershaw's right of action accrued as much as if he had paid the money, there being no difference between a payment in property and a payment in money. Some of the authorities cited by counsel show that if the land of a surety be extended, or if he pay in property, it is equivalent to a payment in money. This doctrine has been carried still further, it having been held that if a surety discharged his principal, by giving his individual note for the original debt, he is immediately entitled to his action against the principal, although he has not paid the substituted note: *Cornwall v. Gould*, 4 Pick. 444; *Ingalls v. Dennett*, 6 Greenl. 79; *Craig v. Craig*, 5 Rawle, 91; *Atkinson v. Stewart*, 2 B. Mon. 348. Now suppose Kershaw had given his individual note to Flournoy, in full satisfaction of the amount of his execution, then, within the very letter of these authorities, he would have been entitled immediately to his recourse against Haring, on the ground that he had satisfied Haring's liability. The principle is the same when the satisfaction is made with property, either sold to Flournoy, or levied on by him. In such case an immediate right springs up, subject, however, to be defeated, as we shall presently explain.

Courts of law and courts of equity follow very much the same general doctrine on the subject of set-off; except that there are mere equities which can not be enforced at law. The only case which we have been able to find resembling the present, is the case of *Feazle v. Dillard*, 5 Leigh, 30. Feazle gave his bond to Dillard, and, before he had notice of the assignment of the bond, he became Dillard's surety in another bond to a third person. The first bond was assigned, and Dillard became insolvent. Suits were brought against Feazle on both bonds, and he filed his bill to enjoin proceedings on the assigned bond, and claimed to be allowed the amount of the bond which he had assigned as surety as an offset, on the ground that he had signed as surety before notice of assignment, with a view to his own liability to his principal, and on the ground of the principal's insolvency. The court distinctly recognized and admitted his right to the set-off, but held that he had waived it by acts subsequent to the assignment. This case, it is true, was in

equity; but there was no levy on Feazle's property, and not even a judgment against him when he filed the bill. Does not the levy and consequent satisfaction in this case, before notice of assignment, so settle and determine the rights of the parties, as to make an offset cognizable at law? We think that such is the necessary result of the principles before stated.

But admitting that the matter pleaded was good as a set-off, still it was only *prima facie* so. Haring may have paid the debt before the day of sale; the property may have been destroyed by unavoidable accident, or the levy removed by other legal means. In any such case, the parties would have been restored to their original condition. But if anything of this kind occurred, it was incumbent on the plaintiff to show it. A subsequent discharge of the levy would come properly from the plaintiff as matter in avoidance. Such discharge would have constituted the proper subject of a replication in avoidance of the *prima facie* case made out by the plea. The plaintiff, however, demurred, and thus admitted the plea. If this plea had averred that the property levied on was sold, then no one could question the defendant's right to the offset, because a sale would have amounted to an unqualified satisfaction for the amount raised. But we do not think such averment necessary, for two reasons: 1. The law does not require a party to aver what it presumes from a given state of facts, and it will presume that the marshal sold the property, because it was his duty to do so; that being the very object of the levy. 2. The law does not require a party to aver any fact which is not essentially necessary to his right. A sale was not indispensable to an absolute satisfaction, for if the officer wasted the property, it is the same thing as to the defendant. It is sufficient in pleading to state a *prima facie* case; rebutting matter must come from the other side. This plea, however, was defective in one particular. It professes to answer the whole cause of action, and to set off the entire amount due the plaintiff, when, in truth, the amount claimed by defendant is considerably less than the amount claimed in the declaration. In other words, by plea to the whole action, the defendant wishes to set off a less amount against a greater. For this reason it was demurrable: Barbour on Set-off, 169; Babington on Set-off, 80, 81.

But the sufficiency of the set-off is a question which also arises under the general issue with notice of set-off, and it being presented in two forms, it was immaterial under which we should consider it. The action was against the drawer, the payee, and

acceptor, under the statute, and *non assumpsit* was a proper plea. The defendant filed with the general issue an account for twenty thousand dollars and a note for thirteen hundred dollars, and it appears by the bill of exceptions that the defendant's counsel, when the demurrer was sustained to the plea, offered proof of the same facts which he had pleaded specially under the general issue. It was competent to make such proof, and if the facts had been proved as they were pleaded, then it would have been competent for the plaintiff to have introduced rebutting proof to show that the levy was discharged, and the court erred in ruling out the defendant's evidence.

We can see no reason whatever for ruling out Haring's note. That was given to Kershaw long before the notice of transfer, and, of course, constituted a valid set-off. This error would, of itself, be sufficient to reverse the judgment.

Judgment reversed and new trial granted.

LEVY UPON GOODS OF SUFFICIENT AMOUNT DISCHARGES THE JUDGMENT:
Hunt v. Breeding, 14 Am. Dec. 665.

MARKHAM v. MERRETT.

[7 HOWARD, 437.]

RELINQUISHMENT OF DOWER BY AN INFANT FEME COVERT is not binding upon her; and may be avoided after the death of her husband, without repaying any part of the purchase money paid to her husband by his vendee.

LANDS PURCHASED WITH PARTNERSHIP FUNDS ARE SUBJECT TO A RIGHT OF DOWER where the purchase of the lands was not in pursuit of the partnership business, and it is not necessary to have recourse to the land in order to pay the firm debts; and where, moreover, there is no special agreement between the parties that the land shall be considered as personalty.

APPEAL from the probate court of Yazoo. The opinion states the case.

Pugh, for the appellant.

B. S. Holt, for the appellees.

By Court, SHARKEY, C. J. The appellant filed her petition in the probate court of Yazoo county, praying that dower might be allotted her in certain lands and town lots, of which her husband Lineus B. Markham had been seised during coverture, particularly by specifying each tract of land and town lot. Her

claim was resisted by the appellees, Merrett and four others, all holding separate lots in the town of Manchester, and the court having decreed in favor of the appellees, this appeal was taken.

The appellees all except one insisted in their separate answers that Markham was not in his life-time seised of the lots claimed by them, except as a partner with Vincent Galloway, and also on relinquishments made by demandant. To avoid the relinquishments, the demandant replied infancy, which being fully sustained by the proof, and no subsequent act of ratification shown, can not be seriously questioned. It is insisted, however, that before she can be entitled to dower, she must restore a proper proportion of the purchase money; and secondly, that she is not entitled to dower, because the lands and town lots were purchased and sold as partnership property. Wherever the contracts of infants are voidable merely, they are in some instances required to restore the consideration received, before they are allowed to avoid them. Thus, in executed contracts for chattels, the purchase money must be restored, and perhaps the same rule might be justly applied as to real estate. When goods have been sold to an infant on a credit, if he wish to rescind he must restore them. But in this instance, we have no evidence that Mrs. Markham received anything, and her right to avoid can not therefore be placed on the condition that she pay back. We have seen no authority which would justify us in holding her bound to pay back a part of the purchase money received by her husband. The case therefore must turn exclusively on the other question, to wit: Is the wife entitled to dower in lands which Markham held in his life-time in partnership with Vincent Galloway, and which were sold during coverture? We hold the affirmative of this proposition, and think that under the circumstances of the case, there can be no doubt about the correctness of our conclusion.

It is true that there may be cases in which a wife will not be entitled to dower in land held in partnership, but the reason is obvious, and can not apply in a case like the present. When land is held by a firm, and is essential to the purposes and objects of the partnership, then it is regarded as a part of the joint stock, and will be regarded in equity as a chattel. Or if it be apparent from the contract of partnership that it was designed to constitute a part of the joint stock, and to be sold as such for the payment of debts, and the surplus divided, then it will be so regarded in equity, being there treated as that species of property into which it was designed to be converted. This

distinction, I apprehend, furnishes the ground on which dower is to be allowed or disallowed in chancery. But to what extent, or to what portion of the real estate held by a partnership, a court of chancery will apply this rule, and consider it as joint stock convertible into personalty, is a question which seems to have been much mooted, and which is even now in rather an unsettled state. The earlier decisions in England went no further than to apply the rule to such real estate as was absolutely necessary for the purposes of the partnership, or to such as was by the agreement of the parties to be held as joint stock, and sold and applied as such at the dissolution of the firm. The later decisions there seem to incline towards the propriety of considering all lands held by a partnership as standing on the same footing.

One reason which induced the courts to favor a change of the rule was, that it was unjust to prefer the rights of the heir at law, when the whole family may have been induced to look to it and consider it as a common fund for the benefit of all when the firm should be dissolved. This reason could have no weight here, the right of primogeniture being abolished. Still some of the courts of this country seem inclined to follow the modern English rule to its full extent. We are not inclined to discuss this vexed question, as the case before us does not require that we should decide between the conflicting authorities. I apprehend that no case can be found which would furnish an authority for the interposition of a court of chancery, unless the case should present one of the following features: 1. That the land held by the partnership was necessary to pay the debts of the firm; 2. That by the contract of partnership it was agreed to be treated as joint stock, and sold at the dissolution; 3. That the parties themselves had considered it as personalty and part of the joint stock; or, 4. That a sale was necessary to make proper distribution. In a case which presented any of these questions, a court of equity might possibly treat the land as personalty; but this is a question exclusively of equity jurisdiction, and we are in this case not deciding it in that capacity, nor do we think the facts would justify the application of the power, even if we had it.

The articles of partnership are not before us, but Galloway, one of the partners, after being released from his covenants, was examined as a witness. He says that the partnership was formed in 1833, for carrying on a mercantile business, which was afterwards extended by mutual consent to the purchase and

sale of town lots, tracts of land, plantations, and to planting, and the record shows that a very extensive business of this sort was done. These purchases were not made for the purposes of the firm, according to its original design. They were not necessary to enable the parties to carry on a mercantile establishment, nor have we any evidence that the lands so purchased were by the contract to be considered as personalty. They did not themselves treat the land as personalty or joint stock; they conveyed not by their partnership name, but as individual tenants in common, and in every instance a relinquishment of dower was taken, showing that they considered that they were making an ordinary conveyance of land. The purchase of land with the joint fund constituted them tenants in common, and might be regarded as a division of the fund to that extent. The lands in which dower is claimed, were sold during coverture, and this necessarily cuts off the inquiry as to whether they are to be considered as a part of the joint stock. No one who has an interest in that stock is contesting the claim. The land is now beyond even the reach of the convertible power of a court of equity, and even if it would, under different circumstances, treat it as personalty for the purpose of closing the firm, paying the debts and dividing the surplus, it can not now be so treated.

It is now the case of a tenant in common, who has conveyed without valid relinquishment of dower. The statute is express that the widow shall be endowed of lands of which her husband died seised, or which he had before conveyed, in which dower had not been relinquished. In support of this view of the subject, I refer to *Green v. Green*, 1 Ham. 535; *Bell v. Phyn*, 7 Ves. 458; *Ripley v. Waterworth*, Id. 425; Coll. on Part. 70-77; *Rop. Husb. & W.* 345; *Park on Dower*, 106, 107; *Yeatman v. Woods*, 6 Yerg. 20 [27 Am. Dec. 452]; *Sumner v. Hampson*, 8 Ohio, 328 [32 Am. Dec. 722]; *Goodwin v. Richardson*, 11 Mass. 470. It seems that dower in lot 232 was refused by the court, because it was held in trust, this lot having been conveyed by Markham only. The deeds are not set out at length, but it is agreed that they are properly described. The record states that "demandant read in evidence record of deed of Lineus B. Markham to H. G. Runnels, conveying lot 232, in Yazoo city, for the consideration of one thousand dollars." From this description we learn nothing of a trust, and we can not therefore decide the question in that way.

The rule in regard to allotting dower, when improvements

have been made by the alienee, will be found in the case of *Wooldridge v. Wilkins*, 3 How. 360.

The judgment must be reversed, and the cause remanded.

The case of *Wooldridge v. Wilkins*, 3 How. 360, referred to in the opinion of the court, decided that the widow, claiming dower in lands sold by her husband during coverture, was not entitled, where improvements had been put upon the land by the alienee, to dower in the increase of value thus imparted to the land, but must be endowed according to the value of the land at the time of alienation.

DOWER WILL NOT BE ALLOWED TO THE WIDOW OF A DECEASED PARTNER, where the land was acquired as partnership property, and is necessary to the discharge of the partnership debts: *Sumner v. Hampson*, 32 Am. Dec. 722.

COMMERCIAL AND RAILROAD BANK v. HAMER.

[7 HOWARD, 443.]

A BANK INTRUSTED WITH A NOTE FOR COLLECTION is bound to the exercise of due and proper diligence in making demand and giving notice, so as to hold all parties liable, and in default of such diligence becomes responsible to the holder of the note.

A DEMAND MADE AFTER THE CLOSE OF BUSINESS HOURS at the bank at which the note is payable is yet sufficient if the proper officer of the bank is found, and his refusal to pay is upon the ground that there are no funds in the bank to meet the note, and that there have not been at any time during business hours.

CASE. The gravamen of the action was the alleged negligence of defendant, plaintiff in error, in making demand of payment on a note intrusted to it for collection. An agreed case was submitted to the court, whereupon it appeared that the note was payable at the Planters' Bank of Vicksburg, and that after the close of business hours upon the day upon which it fell due, that is to say, at some time after two o'clock P. M., the note was delivered by defendant to its notary, E. H. Maxy, to make demand of payment thereof. That after the delivery of the note and before four o'clock P. M., the said Maxy called at the Planters' Bank, and having obtained entry therein, though the bank was then closed to general business, made demand of payment upon the paying teller thereof. That such payment was refused for the alleged reason that there were no funds in the bank applicable to the payment of the note. That the note was then protested and notice given to the indorsers. That in an action subsequently brought by plaintiff against the latter he was nonsuited because of the insufficiency of the demand of payment that had been made. Upon this case the court below rendered judgment

for plaintiff; and the case was thereupon removed by writ of error to this court.

Norcom and Mason, for the plaintiff in error.

J. Holl, contra.

By Court, SHARKEY, C. J. As a legal proposition, it is undeniably true that a bank which receives a note or bill for collection, is bound to use due and proper diligence in making demand and giving notice, so as to hold all parties liable; and in default of such diligence, the bank itself becomes responsible to the party who deposited the note. This principle has been acknowledged as the true one by an unbroken train of adjudications, and the principle being admitted, the true and only question in all such cases is, what constitutes a diligence that will be sufficient to exonerate the bank from its responsibility. We are not called on to determine whether the bare delivery of the note in due time to a competent notary is of itself such an act as will discharge the bank. Surely if the bank placed the note in the hands of a notary, who presented it in due time, and demanded payment, and gave the requisite notices, then the bank must be discharged; and thinking this to be the case in the present instance, our inquiry is necessarily narrowed down to this single point, was the presentment made at a proper time?

As a general rule, it is undoubtedly true that where a note or bill is made payable, either in its terms or by acceptance, at a bank or banker's, it must be presented and payment demanded within the business hours of such bank or banker. This is laid down as the rule in *Chit. on Bills*, 8th Am. ed., 421. It was so held in the case of the *Bank of Alexandria v. Swann*, 9 Pet. 33; in *Elford et al. v. Teed*, 1 Mau. & Sel. 28; and in *Parker v. Gordon*, 7 East, 385. But the rule is subject to an exception, and the case at bar falls within that exception. Thus in the case of *Garrett v. Woodcock*, 6 Mau. & Sel. 44, the court said, "though the presentment was out of banking hours, there was a person stationed for returning an answer, and an answer was returned the same as would have been if the presentment had been made within the hours of business. The answer was not that the party came too late, but that there were no orders. The object of the presentment was completed," etc. So in *Henry v. Lee*, 2 Chit. 124, Lord Ellenborough held that presentment out of business hours, the note being payable at a banker's, was not in general sufficient, and would not do if nobody is there of whom demand could be made; but, said his lordship, if somebody is there, and the person pre-

senting gets an answer, it is sufficient. The case before us is even stronger for the plaintiffs in error than either of those referred to. The business hours of the bank closed at two o'clock; the presentment was made by the notary between two and four o'clock P. M. on the third day of grace, at the bank, and demand made of the teller, who was found there. He was a proper officer of the bank to return an answer, and his answer was, that there were not then funds in bank to pay the note, nor had there been any during the day. The same answer was received which would have been given within business hours, and by the same officer, and this we think brings the case within the exception stated. He did not say that the presentment was too late, but that there were no funds.

An additional circumstance is stated in the agreed case, which if the case were doubtful in its character, would be entitled to great weight. It appears that the plaintiffs below sued the makers and indorsers of the note, and were nonsuited. It is probable that the presentment and demand were held insufficient to charge the indorsers, and that the nonsuit was the consequence. If so, we can only say that the parties rested with too much confidence on the correctness of that decision.

The judgment must be reversed, the cause remanded, and a *venire de novo* awarded.

BUTLER v. JONES.

[7 HOWARD, 587.]

PAYMENT TO THE ATTORNEY OF THE PLAINTIFF IN EXECUTION discharges the sheriff who has collected money under the execution; unless he has been notified by the plaintiff that he has changed his attorney, or that the money is not to be paid to him.

MOTION against the sheriff of Lafayette county for money collected. The opinion states the case.

Taliaferro, for the plaintiff in error.

Hughes, *contra*.

By COURT. The defendant in error made his motion against the plaintiff in error, who was sheriff of Lafayette county, for money collected, which was sustained. It appears that Jones had recovered judgment against one Dickens and another, and sued out his execution, which was in the hands of the sheriff. Dickens was introduced as a witness for Jones, and testified, that Jones, a short time before court, had agreed to wait with him for

his money, and accordingly Jones wrote a note to the sheriff to that effect, which the witness had lost, but when he saw the deputy sheriff he stated the substance of it to him. Jones also wrote that he did not wish his attorney to receive the money, which the witness also told the deputy sheriff. The attorney was informed of the same facts by the witness. The attorney, however, pressed the collection of the money, a part of which was collected and paid over to the attorney, whose receipt for the amount was in evidence. No other material facts were disclosed.

Where the sheriff collects money on execution, he is fully authorized to pay it to the plaintiff's attorney of record, and the payment made to the attorney in this instance was a discharge to the sheriff, unless he had been notified by the plaintiff that he had changed his attorney, and that the money was not to be paid to the attorney of record. The evidence is, that Jones stated that he did not wish his attorney to receive it. This declaration was too loose and indefinite to amount to instructions not to pay it to him.

Judgment reversed.

TIERNAN v. COMMERCIAL BANK OF NATCHEZ.

[7 HOWARD, 648.]

- AN AGENT IS NOT RESPONSIBLE FOR THE NEGLIGENCE OR WANT OF SKILL** of a subagent employed by him, where such employment was necessary to the transaction of the business intrusted to him, and he has used reasonable diligence in his choice as to the skill and ability of the subagent.
- A BANK RECEIVING A BILL FOR COLLECTION,** discharges its duty, if, when the bill becomes due, it places it in the hands of a notary for protest and for the proper notices to be given, and is not liable though recourse is lost against the indorsers because of the failure of the notary to properly discharge this duty.

ASSUMPSIT. The action was for the amount of a bill of exchange, the property of plaintiffs, delivered to defendants for collection, and which it was insisted by the former was lost to them through the negligence of the latter. This negligence consisted in a failure to properly notify the drawer of the bill of its non-payment, whereby he became discharged. Defendants, upon maturity of the bill, had delivered it to the notary employed by them, for demand to be made thereupon, and for protest, etc., and plaintiffs contended that they were liable for his failure to give proper notice. Defendant below had verdict.

Holt and Winchester, for the plaintiff in error.

Quitman and McMurran, contra.

By Court, CLAYTON, J. In our view of this case, the only question necessary to be considered is, whether a bank which receives a bill for collection, properly discharges its duty, if the bill is not paid, by placing it in the hands of a notary, to protest and give the requisite notices. In other words, whether if the notary fails to give the proper notices, the bank is liable for such failure.

In the performance of this duty of collection, as well as of all other acts, a bank of necessity depends upon agents. It has no capacity to act of itself, and can perform none of its acts but through the instrumentality of agents. In undertaking to collect for others, a bank becomes an agent, and is understood to contract for reasonable skill and ordinary diligence. By reasonable skill we are to understand such as is, and no more than is, ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment; by ordinary diligence, that which persons of common prudence are accustomed to use about their own business and affairs: Story on Agency, 172. In many cases it becomes necessary, and is usual for the agent to employ a subagent to transact the business. A bank can not do it in any other way, for its own officers are but its agents. In these cases the agent will not ordinarily be responsible for the negligence or misconduct of the subagent, if he has used reasonable diligence in his choice as to the skill and ability of the subagent: Id. 190. The application of these principles will be decisive of this case. The bank selected as its subagent a notary public, an officer created for the public convenience, and whose most familiar and important duty it is, to protest dishonored paper, and to give notice to all the parties interested. It is in proof that the bank pursued the same course precisely with its own paper, which it took in reference to this bill. An agent is rarely, if ever, required to exert greater diligence as to his agency, than he bestows on his own private affairs: Id. 175.

In this state a notary is authorized to give notice as well as to make protest, and no agent could have been selected by the bank with more propriety for the performance of this duty, than one whose profession and office were calculated peculiarly to fit him for its discharge. They are almost universally resorted to for the purpose. We can not perceive, therefore, that the bank was

wanting either in the degree of skill or diligence, which is required, under such circumstances, to exempt an agent from liability. We are fortified in this conclusion by the case of *Belle-mire v. Bank of United States*, 1 Miles, 173, affirmed upon appeal; S. C., 4 Whart. 105. It is held in that case that a "bank which receives a note for collection, and when it is overdue places it in the hands of a notary in the usual course, is not liable for the neglect of the notary to give notice." Precisely the same principle is established in the case of *Hyde and Goodrich v. Planters' Bank of Mississippi*, 17 La. 560 [36 Am. Dec. 321]. This case is based in part upon the same statute of this state, which is applicable to the present cause, and which gives authority to the notary to notify the parties. See also *Bank of Union v. Smedes*, 20 Johns. 372.

The judgment will be affirmed.

LIABILITY OF BANK FOR NEGLECT OF NOTARY employed by it: See *Allen v. Merchants' Bank*, note, 34 Am. Dec. 307-317.

JOHNSON v. BLASDALE.

[1 SMCLES AND MARSHALL, 17.]

NOTE SIGNED IN BLANK AND DELIVERED TO ANOTHER to fill up is an unlimited letter of credit. If the authority to fill up is limited to a certain amount, a third person taking with knowledge of the limited authority may enforce the note to the amount to which it was authorized, but not beyond that amount.

WRIT of error. The facts are stated in the opinion.

Landsdale and Brooke, for the plaintiffs in error.

Thomson, for the defendants in error.

By Court, CLAYTON, J. This was an action of assumpsit upon a promissory note for some two thousand one hundred dollars, which was executed under the following circumstances. The defendant, Gayden, signed the note in blank, and delivered it to Blasdale & Grubbs, with authority to them to fill it up with the amount which they might purchase at the sale of Thomas Land, deceased, of whose estate Johnson was the administrator. It was the intention that Gayden should be their surety for the amount of their purchases. At the sale Blasdale & Grubbs bought to the amount of about one thousand eight hundred dollars, and two men by the name of Beasley and Thompson, likewise bought to the amount of three hundred dollars, and

when the note was about to be filled up; Blasdale & Grubbs included the amount of the purchase of Beasley and Thompson, with their own, and inserted the two together in the note, taking the note of the latter to themselves for the amount of their purchases. This was done with the knowledge of the administrator, and Blasdale stated at the time to him that he was authorized by Gayden to fill it up with from two thousand three hundred dollars to two thousand five hundred dollars. There was no proof that Johnson, the administrator, had any knowledge of what the understanding between Gayden and Blasdale & Grubbs was, other than the above statement, which was made in his presence by Blasdale. The jury, upon the testimony, found a verdict in favor of the defendant, Gayden. A motion for a new trial was made and overruled, and the case brought up to this court by writ of error.

It is certainly true that he who signs a bill or note in blank, and delivers it to another, makes that other his agent, and authorizes him to fill it up with an indefinite amount. It is an unlimited letter of credit, yet the rule must be received with this qualification. If there is, in fact, a limit to the authority, which has been exceeded; if a third person takes the note with knowledge that the limit has been transcended, the note will not be binding in his hands as against the surety for the full amount. *Chit. on Bills*, 33; *Violett v. Patton*, 5 Cranch, 151; *Russell v. Langstaffe*, 2 Doug. 514. But the question will arise whether the note is voidable *in toto*, or only for the excess beyond the sum which was authorized. The latter seems to us to be the true rule, and that the act of an agent, who exceeds his authority, binds his principal to the extent of his authority, but is void for the residue: 2 Kent, 617; *Story on Agency*, 158; *Windle v. Crowther*, 1 Crompt. & J. Ex. 316. If the principle of failure of consideration is applied to this note, the result is the same. There was a good consideration to the extent of the purchase of Blasdale & Grubbs, but none which can be extended to Gayden for the purchase of Beasley and Thompson.

The plaintiff should therefore be permitted to recover the amount for which Gayden agreed to become bound—the amount, namely, of the purchase of Blasdale & Grubbs—but no more from Gayden. From the nature of the transaction itself, the administrator might have inferred that Blasdale & Grubbs had authority to bind Gayden for the amount of their own purchases at the sale; but that they had none to bind him for the purchases of others. There is not, however, in our view, any

evidence to create a presumption of fraud on the part of the administrator, which would prejudice his right of recovery to the extent before indicated. A new trial will be awarded, with instructions to conform to the principles herein laid down.

Judgment reversed, and new trial awarded.

SIGNING AND DELIVERING NOTE WITH BLANK to be afterwards filled up with amount, gives an unlimited authority to insert any sum: *Hall v. Bank of Commonwealth*, 30 Am. Dec. 685; *Roberts v. Adams*, 33 Id. 291; *Herbert v. Huie*, 34 Id. 755; but where a blank signed by one person was filled in so as to make it appear a joint and several note, and another signature to the note was obtained, the original maker was held discharged: *Bank of Limestone v. Penick*, 15 Id. 136. The principle is well settled in Mississippi that a party signing his name to a blank bill or note either as maker, indorser, or drawer, and delivering it to another, makes that other person his agent to fill it up in any manner he pleases, and a party taking such note or bill without notice that it was filled up contrary to the agreement of the parties, can recover upon the instrument so filled up: *Davis v. Lee*, 26 Miss. 505; *Hemphill v. Bank of Alabama*, 6 Smed. & M. 44; *Tanning v. Farmers' and Mer. Bank*, 8 Id. 139; *Torry v. Fisk*, 10 Id. 590. But if the blank is filled for a greater amount than was authorized, and the holder knew this, it will be void for the excess: *Goad v. Hart's Adm'r*, 8 Id. 787; *Goss v. Whitehead*, 33 Miss. 213.

O'CONLEY v. CITY OF NATCHEZ.

[1 SMEDES AND MARSHALL, 31.]

ACTION FOR MONEY HAD AND RECEIVED will lie, when intruders or trespassers collect that which belongs to another.

WRONG-DOERS HAVING CONVERTED PROPERTY INTO MONEY, the trespass or trover may be waived, and action brought for money had and received.

WHARFAGE EXACTED OF STREAMBOATS AND VESSELS BY OWNER OF SOIL for the use of it is not a tonnage duty, repugnant to the federal constitution.

ASSUMPSIT by O'Conley against the president and selectmen of the city of Natchez. The facts are sufficiently stated in the opinion.

Montgomery and Boyd, for the plaintiff in error.

Dunlap and Jennings, for the defendants in error.

By COURT. This action was brought to recover the amount of wharfage received by the city authorities, whilst in possession of plaintiff's wharf, for which he held a lease. Besides a special count the declaration contains counts for use and occupation, and for money had and received. The jury having found for the defendants (the president and selectmen), the plaintiff moved for a new trial, which was overruled, whereupon

he set out the evidence and took his bill of exceptions. No question of law having arisen on the trial, we are only called upon to decide upon the propriety of the verdict according to the pleading and evidence. The plaintiff proved his ownership of the wharf—the collection of wharfage by defendants, and that they derived great profit from it, by tolls or charges, exacted of boats for the use of the landing. Some of the witnesses say that the defendants must have received eight hundred or nine hundred dollars, other say more. This testimony was sufficient to entitle the plaintiff to a verdict, unless there be some legal impediment to his right of recovery.

For the defendants, it is insisted that the action was not well brought, inasmuch as there was an adverse possession—that the relation of landlord and tenant was not established. On the former argument of the cause, we thought this objection well taken, but a re-argument was granted, and a second examination of the evidence induces the belief that we were mistaken. There was no dispute about the right of soil. The defendants filed several pleas asserting long occupancy, and dedication of the wharf to public uses; but these pleas seem to have been filed at a subsequent term, without leave of court, and were properly disregarded; and there was no proof tending to show any right in them, or any possession, further than such possession as they might have taken for the purpose of collecting the wharfage under a city regulation. The plaintiff's right was fully established, and there is nothing which shows that he was turned out or yielded possession of the landing. On this view of the subject, the defendants were mere intruders or trespassers in collecting that which belonged to another. In such cases, the action for money had and received will lie. Even trover or trespass may be waived if the wrong-doer has converted the property into money; and this is the rule also when profits have been received by injuries done to real property: See 4 Ph. Ev., C. & H.'s ed., 220, note 347, and authorities there cited. The special count, and the count for use and occupation, without proof to sustain them, can not deprive the plaintiff of his right to recover under the money count.

But it is also said, in argument, that the wharfage exacted of steamboats and other vessels, was a tonnage duty, and that the act authorizing it, is repugnant to the tenth section of the first article of the federal constitution. Tonnage duty, within the meaning of the constitution, is a tax or charge imposed on vessels engaged in importing merchandise into the ports of the

United States. It is a commercial regulation exclusively, being a duty on the vessel, levied for the privilege of entering our ports as carriers. The wharfage here claimed is a mere charge made by the owner of the soil for the use of a portion of it, which charge he has a right to make. The price, perhaps, may be subject to municipal regulation, but the right is undoubted. The act of 1825, referred to, does not profess to divest the right of property in the banks of the river, but it merely authorizes the president and selectmen to establish the rates of wharfage; and to collect them through the agency of a harbor master, and it is therefore not in conflict with the constitution.

According to these views the plaintiff was entitled to recover, and a new trial must be granted.

TORT MAY BE WAIVED AND AN ACTION BROUGHT for money had and received, where goods have been tortiously taken and converted into money; but it is necessary to prove that the goods have been converted into money, or sufficient time must have elapsed to justify the inference that they have been so converted: *Mhoon v. Greenfield*, 52 Miss. 434; *Isaacs v. Hermann*, 49 Miss. 449; *Moses v. Macferlan*, 2 Burr. 1005; *Eastwick v. Hugg*, 1 Dall. 222; *Lee v. Shore*, 1 Barn. & Cress. 94; *Gilmore v. Wilbur*, 22 Am. Dec. 410. For a full discussion of when torts may be waived and relief sought by action of *assumpsit*, see note to *Webster v. Drinkwater*, 17 Id. 242.

ACTION FOR MONEY HAD AND RECEIVED may be maintained by one person against another, when the latter has money to which in equity and good conscience the former is entitled: *Little Rock Bank v. Plimpton*, 28 Am. Dec. 286; *O'Fallon v. Boismenu*, 26 Id. 678; *Goddard v. Bulow*, 9 Id. 663.

MOUNT v. HARRIS.

[1 SMEDES AND MARSHALL, 185.]

PERSONAL PROPERTY MAY BE SOLD CONDITIONALLY, the same as real property. Possession, although *prima facie* evidence of ownership, may be rebutted.

RESCISSIION OF A SALE, WHERE THE VENDEE CAN NOT PAY the purchase money, may be made by agreement of the parties, and when made, will cut out liens subsequently acquired against the vendee.

APPEAL from the superior court of chancery.

D. C. and R. W. Briggs, for the appellants.

Clifton, for the appellee.

By COURT. By the bill it appears that on the seventeenth of March, 1840, Moses Gallaway, one of the respondents, sold to Thomas Cook, another of the respondents, a negro woman for which Cook was to pay, on the first of January following, nine

hundred dollars. The bill of sale contains on its face the condition, that in case Cook failed to pay at the time specified, then the negro woman was to be returned to Gallaway; and the note given for the purchase money contains the same stipulation. On the nineteenth of March, Gallaway transferred his entire interest in the contract to the complainant, Harris; by which assignment Harris was substituted to all the rights of Gallaway. Some time in the summer of that year, Cook left the state, after declaring to Gallaway that he would not be able to make the payment, and would return the slave. After Cook's departure, the slave and the bill of sale were delivered to the complainant. The respondents sued out attachments against Cook as an absconding debtor, which were levied on the slave then in possession of the complainant, as the property of Cook, to enjoin proceedings on which the bill was filed. The answer of Gallaway admits every allegation contained in the bill, and asserts that the sale was only conditional. The deposition of Cook, also, fully sustains the allegations. He also proves that he told Gallaway that he could not comply with the contract, and would deliver up the negro; and when Gallaway came for her, he obtained permission to retain her on hire for a few weeks, in consequence of the sickness of his wife. On this state of facts the chancellor decreed for the complainant, and the respondents appealed.

It is contended that the contract between Gallaway and Cook amounted to an absolute and unconditional sale, and that the negro was consequently liable to the attachments as Cook's property. Such, however, does not seem to have been the intention of the parties, and that intention must regulate the construction of the contract. The bill of sale is in these words: "I, Moses Gallaway of the first part, do trade to Thomas Cook of the second, a negro girl named Matilda, for which said Cook gives his note for nine hundred dollars, due first of January, 1841, which said Cook is to pay him, the said Gallaway, or return him, the said Gallaway, the above-mentioned negro girl Matilda." The note is also in the alternative that Cook was to pay the money or return the negro girl. From these instruments, it seems that Gallaway did not intend to part with his right to the negro girl until the money should be paid; and there is no legal principle which converts the contract into an absolute one, unless there be some evidence that such was the intention of the parties. Personal property may as well be the subject of a conditional sale as real property; and although possession may

be *prima facie* evidence of ownership, yet it is subject to be rebutted. The case of *Howes v. Ball*, 7 Barn. & Cress. 481, cited in the argument, is distinguishable from this. That was an absolute sale of a coach, but the vendor was to hold a claim on it until the bills were delivered in payment. The claim was, at most, nothing more than a mere lien; the right of property had vested by the sale. Here the rights of property did not pass except on the performance of a condition. The vendor retained more than a lien; he did not part with the right. Although this case is similar in some of its features to that of *Hussey et al. v. Thornton*, 4 Mass. 405 [3 Am. Dec. 224], referred to by counsel, there is also at least one material difference. It was there held that such a sale would be regarded as absolute as to creditors who had given credit whilst the property was in possession of the vendee. Here it does not appear that any such credit was given, and the limited duration of Cook's possession renders it probable that no such credit was given.

But there is an additional circumstance in this case, which must be decisive of the question, even if there was any doubt about the nature of the contract. It is competent for parties to rescind a contract, and such rescission will cut out liens subsequently acquired on claims against the vendee. The testimony fully warrants the conclusion that the contract was rescinded. To say the least of it, Gallaway had retained a lien for the purchase money; Cook acknowledged that he would not be able to pay it, and proposed to return the negro, which return was in effect made when he obtained permission to retain her for a short time on hire. And the rescission was absolutely completed, by the delivery of the negro and the title paper to the complainant, before the levy of the attachments. We can not doubt, therefore, but what the decree of the chancellor was correct; and it must, consequently, be affirmed.

CONDITIONAL SALES OF PERSONAL PROPERTY.—A valid conditional sale may be made without writing and unrecorded, by which the vendor retains the title until the vendee pays deferred installments of the purchase money; and a subvendee of such property, in good faith and without notice, will acquire no title as against the first vendor: *Ketchum v. Brennan*, 53 Miss. 596. Where a slave was sold, the sale to be void upon the happening of a certain condition, and it happened, but the vendee retained the slave until his death several years after, when the vendor sued his legal representatives for the purchase money, held, that these circumstances were sufficient to show the sale was to stand, notwithstanding the happening of the condition: *Armstrong v. Sewall*, 26 Miss. 275.

ON CONDITIONAL SALES THE TITLE TO THE GOODS REMAINS IN THE VENDOR until the performance of the condition: See note to *Barrett v. Pritchard*, 13 Am.

Dec. 451. So goods sold on condition that security be given for the purchase money do not pass absolutely to the vendee, on being removed without objection and without the security: *Whitwell v. Vincent*, 16 Id. 355. Under the same agreement, where the vendor delivered the goods without receiving security, but declaring he should not consider them sold until its receipt, held no title passed: *Hussey v. Thornton*, 3 Id. 224; see also *Lane v. Borland*, 31 Id. 33; *Luey v. Bundy*, 32 Id. 359. But it was held there was a waiver of the condition where the vendor voluntarily delivered the goods, without reference to the condition, and without making any demand for its performance until after the goods were attached by the vendee's creditors: *Smith v. Dennie*, 17 Id. 368.

DOWNS v. PLANTERS BANK.

[1 SMITH AND MARSHALL, 261.]

HOLDER OF A NOTE MUST MAIL NOTICE OF PROTEST the day after protest, in time for a mail of that day, unless it leaves at an unreasonably early hour.

INDORSEMENT IS A CONDITIONAL CONTRACT, and the plaintiff must prove performance of everything necessary, to charge an indorser.

NOTICE TO INDORSER MAILED AT NINE O'CLOCK the day after protest, is not sufficient to charge him, in the absence of proof that that day's mail had not then left.

DEFENDANTS in error sued the plaintiff in error as indorser upon a note for seven hundred and fifty dollars, payable in one year. The other facts are sufficiently stated in the opinion.

G. S. Yerger, for the plaintiff in error.

Harrison and Holt, for the defendants in error.

By Court, SHARKEY, C. J. The plaintiff in error was sued by the Planters Bank as the indorser of a promissory note, made by Abijah Downs, payable and negotiable at the Planters Bank, at Natchez. The only question in the case is, as to the sufficiency of the notice to charge the indorser.

On the trial, the plaintiff below offered the record made by the notary who protested the note, the notary having died before the trial. Prefixed to the note was a designation of the places at which the several parties would receive notice, the defendant below having designated "Mount Albion post-office." The evidence of notice, or memorandum made by the notary, is in these words, to wit: "All notices served this twenty-second day of October, 1836, at nine o'clock A. M., according to their several directions specified. T. R., notary public." The note fell due and was protested on the twenty-first of October; the plaintiff proved that Mount Albion was the nearest post-office to

defendant. R. M. Gaines, a witness for the defendant, stated that the bank, at the time of protest, had regular business hours from ten o'clock A. M. to two o'clock P. M., and that, according to the custom of the bank, debtors had until the close of business hours to pay their notes; that notes made payable in the bank were usually kept in the teller's drawer on the day of their maturity. This was all the evidence offered, and the defendant's counsel asked instructions from the court, amongst others the following, which the court refused to give, to wit: "That the statement of the notary at the foot of the notarial record (which is above set out) is not sufficient evidence of notice, or diligence to give notice, to charge the indorser. That the plaintiff must show that the notice was put in the post-office, at Natchez, in time to go out by the first mail of the day succeeding the protest. The plaintiff must show all the facts necessary to charge the indorser, without leaving anything to intendment of inference."

The court did instruct the jury, amongst other things, that notice of protest must be shown to have been put in the post-office at Natchez, in time to go out by the first mail of the day succeeding the protest, if the first mail of that day did not leave at an unusually early hour; that whether the notice was properly sent, the jury are to judge from all the facts and circumstances in the case, and if they believe from them that the notice was properly sent, they must find for the plaintiff; and if not, then for the defendant. That they were to weigh the evidence, and decide according to the preponderance of proof; to the giving of which instructions, and the refusal to give those asked, defendant excepted; and a verdict being found against him, he moved for a new trial, because the judge misdirected the jury, and because the verdict was contrary to the law and the evidence. The motion was overruled, and thereupon the defendant's counsel embodied the evidence in a bill of exceptions and brought up the case by writ of error.

It is not necessary that we should decide on every point which is presented by the record and insisted on in the argument. If there be good grounds for reversing the judgment on errors which are beyond doubt, it will be unnecessary for us to attempt to settle such points as may be more questionable. We think the verdict was contrary to law and evidence, and that it should therefore be set aside. In order to constitute a sufficient notice to charge an indorser, if it is to be sent by mail, it must, at furthest, be put into the post-office in time to go by the mail of the day

next succeeding the protest, if there may be a mail which goes on that day, and, if not, then by the first mail which goes afterwards. The holder need not put the notice in the office on the same day the note is protested, but he must on the next day in time for a mail of that day, unless it leaves at an unreasonably early hour: *Chitty on Bills*, 10th ed., 484; 3 Kent's Com. 105, 106; *Whitwell v. Johnson*, 17 Mass. 449 [9 Am. Dec. 165]; *Smedes v. Bank of Ulica*, 20 Johns. 372; *Lennox v. Roberts*, 2 Wheat. 377; *Hartford Bank v. Sledman*, 3 Conn. 489; *Goodman v. Norton*, 17 Me. 381; *Story on Bills*, 315. This rule has never been departed from in this country in any case which has fallen under my notice, although there seems to have been some countenance to a different one in England, particularly in the case of *Hawkes v. Saller*, 4 Bing. 715. Chancellor Kent, in a note to his commentaries, has cited this and some other cases, and concludes that the rule is enlarged by them, but I apprehend that the large majority of cases will be found to correspond with the rule which prevails in this country.

It is also a rule of law, that the plaintiff must prove everything which is necessary to charge an indorser. The contract of an indorser is strictly conditional. He undertakes to pay if the maker does not, provided he is duly notified of the demand and refusal. These are conditions precedent to his liability, and there is an obligation on the holder to make the demand and give the notice; and as the indorser is not liable unless these things have been performed, it devolves on the holder to prove that he has performed the conditions precedent, before he can compel the indorser to perform his contract. *Chitty* lays down the rule in the most unqualified manner, that it is incumbent on the holder to prove distinctly, and by positive evidence, that due notice was given to the party sued, and that it can not be left to inference or presumption: *Chitty on Bills*, 10th ed., 479. This doctrine is taken from the decision of Lord Ellenborough, in the case of *Lawson v. Sherwood*, 1 Stark. 314. Without pretending to say that it is incumbent on the plaintiff to introduce positive proof, or to settle what grade of proof will be required, we feel well satisfied that he must make satisfactory proof that he has performed all that the law required of him to perform. He must prove everything necessary to charge the indorser. This is clearly the rule of the American cases: 3 Kent's Com. 104; *Brown v. Ferguson*, 4 Leigh, 37 [24 Am. Dec. 707]; *Whitwell v. Johnson*, 17 Mass. 449 [9 Am. Dec. 165]. In the case of *Smedes v. The Bank of Ulica*, 20 Johns. 372, the court said, the question

is not what inference the jury might draw, but what testimony does the law require in this case. We have seen that this is a condition precedent, and that strict proof is required; the law has allowed the indorser this protection; nothing short of clear proof of notice shall subject him to liability. To the same effect is the case of *Goodman v. Norton*, 17 Me. 381. The obvious meaning of the rule is, that the notice which the plaintiff is required to prove must be a legal notice; that is, a notice sent in due time and properly directed.

According to these rules it will be apparent that the court gave rather too much latitude in the charge. It is also apparent that the evidence did not justify the verdict. The notary states that the notices were served the twenty-second of October at nine o'clock A. M. If it be admitted that "served" means sent by the mail, the indorser having resided at a distance, this does not amount to an affirmative, showing that the notice was put in the office in time for the first mail, or any mail of that day. It is quite probable that the mail left before that hour; but it will not do to rest on probability. To make the notice sufficient, the plaintiff should have proved the hour at which the mail left. There was no proof on the subject, and the jury must have found their verdict on conjecture. It is not a verdict on complicated or doubtful evidence, but a verdict without evidence. It was not a compliance with the rule of law, which requires the plaintiff to prove that he put notice in the office in time for the mail of the next day after protest, for him to prove that he put it into the office at nine o'clock A. M., for it by no means follows that this was in time for the mail. Nor was there any evidence that the mail of that day started at an unusually early hour, which might amount to an excuse for not sending it by the first mail which left after the day of protest.

For these reasons the judgment must be reversed and a new trial granted.

PROOF OF NOTICE to indorser must be made with a reasonable degree of certainty. Positive proof is never absolutely required: *Bland v. Com. & R. Bank*, 3 Smed. & M. 250. The fact of notice must be proved affirmatively; it can not be left to inference or presumption: *American Life Ins. and Trust Co. v. Emerson*, 4 Id. 177. Admission of indorser or drawer that he had received notice is sufficient proof: *Offit v. Vick*, Walker (Miss.), 99. So also admissions of executors and administrators, unless they appear at the trial and are willing to testify themselves: *Duncan v. Watson*, 2 Smed. & M. 121; S. C., 28 Miss. 187. Proof that notice of protest was duly mailed and directed to the indorser at a certain place is insufficient in the absence of proof that it is his place of residence, or of business, or his nearest post-office, or the one where he receives his mail. If he had no residence or place of business, no

notice was necessary; but this fact must be shown: *Stiles v. Inman*, 55 Miss. 469. Proof of due notice to indorser of demand and non-payment must be distinct and clear; it is not sufficient where a witness deposes "to the best of his knowledge" that the letter was put in the office: *Weakly v. Bell*, 36 Am. Dec. 116. That the notary testified, that he usually, in all cases of protest, on the evening of the same day, sent a written notice of dishonor, and that in the present case he believes he sent such notice to the indorsers, was held sufficient in *Miller v. Hackley*, 4 Id. 372. See also *Hoff v. Baldwin*, 13 Id. 385, and *Stewart v. Allison*, 9 Id. 433.

NOTICE BY MAIL TO INDORSER is sufficient if put in the post-office early enough to go by a mail of the day after protest: *Whitwell v. Johnson*, 9 Am. Dec. 165. Notice by mail, when sufficient: See note to *Ransom v. Mack*, 38 Id. 602.

TIME OF NOTICE.—Notice, to be binding, should be given on the same, or the day after, the dishonor of the note; but if the note is received on Saturday, demand and notice on the following Monday is sufficient: *Fortner v. Gibson*, 2 Smed. & M. 151. Where a note falls due on Sunday, demand should be made the previous Saturday, and notice of dishonor served the next Monday: *Fleming v. Fulton*, 6 How. 473; *Barlow v. Planters' Bank*, 7 How. 129. Indorser receiving notice by mail, must give notice to prior indorsers, at furthest, on the next day after its reception: *American Life Ins. & T. Co. v. Emerson*, 4 Smed. & M. 177. If the mail of the next day departs at sunrise, that is an unusually early hour, and the notice need not be deposited in time for that mail: *Deminds v. Kirkman*, 1 Id. 644; so, also, if the next day's mail closes the night before, it need not go by that mail: *Wemple v. Dangerfield*, 2 Id. 445.

GILMORE v. CARMAN.

[1 SMEDES AND MARSHALL, 279.]

COMMON CARRIERS ARE LIABLE FOR ALL LOSSES EXCEPT those which have occurred by inevitable accident resulting from the act of God or from the public enemies of the country.

OWNERS OF STRAMBOATS ARE COMMON CARRIERS where they engage in carrying trade on navigable rivers, and transport merchandise or other articles from one port to another for a price or compensation.

LOSS BY FIRE OTHER THAN FROM LIGHTNING is not within the exception of the act of God, and is chargeable upon the common carrier.

"DANGERS OF THE RIVER ONLY EXCEPTED," IN A BILL OF LADING, will not release the liability of common carriers for loss by fire.

THE facts are stated in the opinion.

W. C. Smedes, for the plaintiffs in error.

G. S. Yenger, for the defendant in error.

By Court, SHARKEY, C. J. The defendants in error brought this suit to recover the value of thirty-two bales of cotton shipped to New Orleans, on the steamboat Vicksburg, which

was consumed by fire on her downward trip; the plaintiffs in error being the owners of the boat.

There can be no doubt but what the owners of steamboats engaged in the carrying trade, on the navigable rivers, are to be regarded as common carriers. It is their business or calling to transport merchandise and other articles from one port to another for a price or compensation. It appears that the boat on which the cotton was shipped was engaged in carrying freight from Vicksburg to New Orleans and back for compensation. In pursuing this as a general business for the accommodation of those having articles to ship, the owners became liable as common carriers, and so it has been held by numerous adjudications directly on this point: *Allen v. Sewall*, 2 Wend. 327; *Orange Bank v. Brown*, 3 Id. 158; *Camden etc. R. R. Co. v. Burke*, 13 Id. 611 [28 Am. Dec. 488]; *Hastings v. Pepper*, 11 Pick. 41. Being common carriers, they are liable for all losses except those which have occurred by inevitable accident resulting from the act of God, or those which may have resulted from public enemies of the country. The owners are the insurers against all losses occasioned by accidents not within the exceptions of law, or which are not excepted by special contract. This, although not the rule of the civil law, is undoubtedly the rule of the common law, and it is now universally enforced in England, except in cases where it has been changed by act of parliament.

Some few of the states of this confederacy may have modified it by legislative enactment, but where no change has taken place, the common law prevails: Story on Bail. 318, sec. 489; 3 Kent's Com. 216, 3d ed.; *Harrington v. McShane*, 2 Watts, 443 [27 Am. Dec. 321]; *Patton's Adm'r v. Magrath & Brooks*, 1 Dudley, 159; *Gordon v. Buchanan*, 5 Yerg. 71. This rule may seem rigorous, and yet it rests upon reasons sufficiently strong to afford, at least, a very plausible excuse for its adoption—reasons, too, which may be still urged with great force in favor of its utility. But as to its policy we have nothing to say. We received it as part of the common law, and the legislature has not thought proper to change it. Besides, it is easy to obviate the rigor of the law by inserting the proper exceptions in the bill of lading.

It is not necessary that we should enumerate all the accidents falling within the exceptions of this rule; it will be sufficient for our present purpose, to determine whether a loss by fire constitutes one of them. It would seem that what are called inevitable accidents can only arise from natural causes, and such

is generally the case though there may be a few exceptions. The criterion, it seems, is, that if it be such an accident as no human foresight or sagacity could have prevented, then the loss will be excused: 3 Kent, 215. In boats propelled by steam, it may be difficult to prevent conflagration, and no doubt is so; but, surely, such accidents can not be said to be beyond the power of human skill and prudence. Steamboats are occasionally consumed by fire, yet for the number of boats, the instances are few; and when we consider the great danger to steamboats from that cause, and the great number liable to that danger, we must ascribe to human skill and prudence, a powerful agency in preventing a more frequent recurrence of such accidents. But on this branch of the subject, too, the books speak but one language. Chancellor Kent says: "A loss by lightning is within the exception of the act of God; but a loss by fire, proceeding from any other cause, is chargeable upon the ship owner:" 3 Kent's Com. 217. The same is the case where the vessel is propelled by steam. The case of *Harrington v. McShane*, above cited, was to recover damages for a loss which was caused by the burning of a steamboat on the Ohio, and the owners were held responsible for the loss. The case of *Patton's Adm'r v. Magrath & Brooks*, was an action for the value of a quantity of cotton burned on board of a steamboat. It appeared that proper diligence had been used, but still the owners were held liable. There was also an attempt to defend the action on the ground that usage or custom exonerated the owners in such cases, where they had used proper diligence. The court held that no distinction could be taken between steamboats and other vessels; that all were alike liable in such a case; and that custom, to constitute an exception to the rule of law, must have been immemorial, certain, and reasonable. These decisions fully sustain the rule of the common law, to its full extent in its application to steamboats, by placing them on the same footing, and entitled only to the same exceptions as other vessels, and we are not aware of any decision to the contrary except in Louisiana under the civil law.

Loss by fire, then, is not a loss by an inevitable accident, which will protect the owners under the law. Are they protected by the exceptions in the bill of lading? It may be true, that although the law will hold the owners liable for a loss, yet they may be exonerated by the exception in their contract. The exception in the bill of lading is in these words: "the dangers of the river, only, excepted." This exception does not

seem to be sufficiently broad to cover any casualty which is not peculiar to the navigation of that river. It is like the exception in bills of lading given by vessels navigating the sea, in which "the perils of the sea" are the words employed; by which natural accidents, peculiar to that element, are meant. Accidents which do not happen by the intervention of man, and which can not be prevented by human prudence: 3 Kent's Com. 216. This general exception in a bill of lading, seems to mean very much the same things that are excepted by the law itself, being no other than inevitable perils on that element, for which the owners would be excused, even without a bill of lading: Story on Bail. 330. But suppose the exception in the bill of lading is entitled to a more extended meaning, and that there are dangers in navigating the river, which fall properly within the exception, which would not be reached by the law, still we find nothing to justify us in saying that the danger of fire is one of that character. It is not a danger which proceeds from, or is peculiar to the river. It arises from the means used in propelling the boat, and not from any obstacle or impediment in the river. The boat itself is the depository of the agent which produces its own destruction. If the owner chooses to employ this agent, he can not, with propriety, say that it is productive of a danger incident to the navigation of the river. This is a danger produced by human agency; it may be counteracted by human sagacity and prudence. The vessel itself may be constructed so as to be free from danger; or, if not, prudence in keeping up a sufficient watch, affords a guaranty for safety. The arrangement of the cargo, with a view to its security, is also calculated to diminish danger. Hence we conclude, that a loss by fire does not fall within the exception in the bill of lading. That all proper diligence was used, does not alter the case. A want of diligence might throw the loss on the owner, even in cases when the law would otherwise excuse him; but the use of diligence does not excuse a common carrier. There is no condition in the law by which he shall be excused if proper diligence be used. He is excused by nothing but accidents resulting from the act of God, or the public enemies of the country, unless he has taken the precaution to protect himself by contract.

It is insisted in argument, that the judgment ought to be reversed, because interest was improperly allowed. This objection is met by the argument by which the court was author-

ized to enter judgment for a certain sum, which was the amount of principal and interest. The court did enter judgment for the amount agreed on. It is also said that the defendants below are entitled to their freight out of the amount recovered. That is true, if it has not been paid; but they made no claim to it in the court below, and can not urge it here as an error in the judgment.

Let the judgment be affirmed.

WHO ARE COMMON CARRIERS.—Every one who undertakes to carry goods for hire, for the public generally, is a common carrier: *Robertson v. Kennedy*, 26 Am. Dec. 466; owners of steamboats transporting goods on freight: *Harrington v. McShane*, 27 Id. 321; *Heirn v. McCaughan*, 32 Miss. 17; boatmen on the Mississippi river, undertaking, for a reward, to carry goods from place to place on the river: *Turney v. Wilson*, 27 Am. Dec. 515; proprietors of stage-coaches, carrying parcels for hire, not belonging to passengers: *Beckman v. Shouse*, 28 Id. 653; see, also, notes to *Sheldon v. Robinson*, 28 Id. 729, and *Creech v. Rich*, 31 Id. 745. So, also, the owner of a vessel used to transport his own goods, was held to be a common carrier for such goods as the master of the vessel received and transported for hire unknown to the owner: *McClure v. Richardson*, 33 Id. 106; also a wagoner carrying goods for hire, though that is not his principal business, but only an occasional and incidental employment: *Gordon v. Hutchinson*, 37 Id. 464; railway companies, and express companies engaged in carrying freight on railways: *Southern Ex. Co. v. Thornton*, 41 Miss. 216; *Southern Ex. Co. v. Moon*, 39 Id. 822; *Miss. C. R. R. v. Kennedy*, 41 Miss. 671; keepers of public ferries: *Powell v. Mills*, 37 Id. 691; *Richards v. Fuqua*, 28 Id. 792; planter employing his wagon in hauling his cotton crop to market, and habitually transporting goods on the return trip for hire: *Harrison v. Roy*, 39 Id. 396; but a carrier of the United States mail is not a common carrier, nor liable as such for money and letters lost or stolen: *Foster v. Metts*, 55 Miss. 77.

LIABILITY OF COMMON CARRIER FOR LOSS BY FIRE.—For full discussion, see note to *Patton v. Magrath*, 31 Am. Dec. 554.

VAN VACTER v. FLACK.

[1 SUMNER AND MARSHALL, 393.]

ORDER DRAWN PAYABLE OUT OF A PARTICULAR FUND is not a bill of exchange; and, though accepted generally, suit can not be maintained without an averment that the fund came into the possession of the acceptor.

ASSUMPSIT. The facts appear in the opinion.

Van Vacter, for the plaintiff in error.

J. C. Mitchell, for the defendant in error.

By Court. The defendant in error brought suit against the

plaintiff in error, declaring, as on a bill of exchange made by one Joseph Riddle, by which he requested the plaintiff in error to pay the said Flack five hundred dollars on the first of January, 1837, "out of the notes left in your hands by me (Riddle) for collection." Van Vacter accepted generally. The declaration contains no averment, that the notes out of the proceeds of which the bill was to be paid had been collected, and for this and other causes, the defendant below demurred, which was overruled, and final judgment given for the plaintiff.

The instrument declared on, is not a bill of exchange, because it is payable out of a particular fund. In England, the law is well settled against its validity as a bill of exchange, and there is no reason to give such a construction to our statute as to embrace it. The decisions are numerous on similar instruments, and in no instance that we are aware of, have they been held to be bills of exchange: Chit. on Bills, Barbour's ed., 157, 158, and notes. This case is distinguishable from that class of cases, in which the particular fund is mentioned merely as a direction to the drawer how he may reimburse himself. This bill is predicated exclusively on a particular fund, not stated to be in hand, but to arise out of notes left for collection. The understanding of the parties must have been, that the payment of the order depended on the collection of these notes. It is like the case referred to in the note to Chitty (Id. 158, n. 1), of an order drawn by a client on his attorney, to pay out of moneys collected. The acceptance was general, and must be understood only as an engagement to pay out of that particular fund, if it should come to hand by the time appointed for payment. On this acceptance an action may be maintained, but it can only be done by averring and proving the collection of the fund. The declaration contains no such averment, and was, therefore, defective, as it shows on its face that the order was payable out of the proceeds of notes left for collection. The court then erred in overruling the demurrer, and in giving judgment for the plaintiff.

The judgment must be reversed, and the cause remanded, in order that the plaintiff may obtain leave to amend.

THIS CASE IS CITED in *Wadlington v. Covert*, 51 Miss. 631, to the effect that an order to pay a given amount out of a specified fund is not a bill of exchange; also citing *Fitch v. Stamps*, 6 How. 487. *Wadlington v. Covert* further holds that such an order is not payable generally, or absolutely, and if the particular fund should fail or never be realized by the drawee, he would not be liable, although he may have accepted.

COMSTOCK v. RAYFORD.

[1 SNEDES AND MARSHALL, 422.]

BILL IS NOT MULTIFARIOUS in which all the complainants are creditors of the same party, and seeking to subject the same fund to their claims.

CREDITOR MAY, WITHOUT A JUDGMENT AT LAW, have a fraudulent sale set aside under the Mississippi statute: How. & Hutch. 520.

NON-RESIDENTS MAY MAINTAIN A SUIT IN CHANCERY against non-resident defendants, provided there is one resident defendant.

ATTACHMENT CAN NOT ISSUE, AGAINST THE PROPERTY OF A NON-RESIDENT, at the time of filing a bill, in the hands of a resident defendant; but after process has been served on the resident defendant, and an affidavit made as to the absence of the other, the court may require surety for the safe keeping of the property for its production to answer the decree.

WRIT of error from the decree of the vice-chancellor. The facts are sufficiently stated in the opinion.

G. S. Yerger, for the plaintiffs in error.

H. W. Waller, for the defendants in error.

By Court, CLAYTON, J. This was a bill filed by two distinct sets of complainants, Comstock, and Robbins, Painter & Co., all of whom are non-residents, against one Reesin R. Chilton, who is also a non-resident of this state, and Thomas Rayford, who resides in this state. It was filed to subject certain slaves in the bill described, alleged to be the property of Chilton, and in the hands of Rayford, the resident defendant, to the payment of debts due the complainants in separate rights. These debts were ripened into judgments in Alabama, but there is no judgment upon them in this state. The bill further alleges that after the rendition of the judgments in Alabama, and after the judgment lien had attached, the slaves in question were brought by Chilton to this state, and placed in the hands of Rayford, to be kept for him. The slaves are seven in number, to five of which, it is said, Rayford makes no claim, but sets up claim to two, under a sale which the bill charges to be colorable, and not for valuable consideration, and that he has never paid anything for them. An attachment was obtained to stay the effects in the hands of Rayford, the resident defendant. To this bill a demurrer was filed, which was sustained by the vice-chancellor, and the bill dismissed, because the court had no jurisdiction, and because the attachment was improperly awarded. From this decree the case is brought to this court for revision.

We will proceed to consider the several grounds taken in support of the decree, in a brief of the counsel for the appellees,

which is marked by very considerable research and ability. The first reason relied on is, that the bill is multifarious, and joins distinct matters in separate rights. There is no doubt that this objection, when it properly applies to a bill, is fatal; but it is not always easy to determine when a bill is or is not liable to the objection. The difficulty is inherent in the nature of the rule itself. It appears to be well settled, as a modification of the rule, that unconnected parties, having a common interest centering in the point in issue in the cause, may unite in the same bill. This is allowed to prevent multiplicity of suits, an evil quite as much to be avoided as multifariousness in the same suit: *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Ward et al. v. The Duke of Northumberland*, 2 Anst. 469; *Fellows v. Fellows*, 4 Cow. 697 [15 Am. Dec. 412]. That great master of equity pleading, Lord Redesdale, thus laid down the rule: "Where there is a general right claimed by the bill, and covering the whole case, it will not be regarded as multifarious, though the defendants have separate and distinct rights:" *Whaley v. Dawson*, 2 Sch. & Lef. 367; *Mayor of York v. Pilkington et al.*, 1 Atk. 282. In the case before us, the complainants are creditors of the same party, seeking to subject the same fund belonging to the same person. There is then a connected interest in the same point; the uniting in the suit produces no confusion or complexity in the defense, and it seems to prevent multiplicity of suits. We think, therefore, this objection can not be sustained.

We adopt this conclusion the more readily, because under the statute in Virginia, from which ours appears to be exactly copied, it is the uniform practice to allow no priority, but to distribute the funds ratably. This is done on the elementary principle, that equality is equity. At some stage of the proceedings, the claims of the creditors have to be considered in connection; and we see no reason why it should not be done before decree, as well as afterwards: See Tate's Dig. 33, n. We think it will be proper to give the same construction and effect to our statute, unless some one of the creditors has a lien prior to that growing out of the proceeding, in which event such lien would not be divested.

It is next insisted that the complainants have no judgments in this state; that they are mere creditors at large, and that without judgment they can not invoke the aid of a court of equity, to set aside a conveyance for fraud. We shall lay out of consideration the fact, that the complainants had obtained judgments in Alabama, and shall not attempt to say what weight they are en-

titled to. We do this because we believe that the statute under which this proceeding is had, fully authorizes any creditor, without judgment, who can bring himself within its provisions, to file his bill and obtain relief: See How. & Hutch. 520. The common law rule was no doubt such as the counsel for the appellee contends that it was. But under statutes in every respect like ours, courts of the very highest grade and respectability, have sustained proceedings by creditors, who had obtained no judgments at law: *Gibson v. White*, 3 Munf. 94; *Wilson v. Koontz*, 7 Cranch, 202; *Kelso v. Blackburn*, 3 Leigh, 300. Indeed the very end and object of the statute would be frustrated, if a previous judgment at law in this state were required, since if the party had a judgment he might proceed to lay his execution on the property at once, or proceed by process of garnishment against the debtor. It was to provide another and additional remedy that the statute was passed, and we can only give effect to it by permitting creditors without judgment to have the benefit of its provisions.

We are referred to the case of *Gasquet & Co. v. Scott et al.*, 9 Yerg. 246, to show that this bill can not be sustained even under the statute. That case arose and was decided upon the act of assembly of Tennessee, passed in 1832; by comparing that act as set out in the opinion of the court with ours, which is to be found in How. & Hutch. 250, sec. 63, it will be found that they scarcely possess a single feature in common. So fully convinced was the legislature of Tennessee of the necessity and propriety of such a law as ours, that they, in 1836, the same year in which that decision was made, passed a law with provisions very closely resembling ours, but extending the remedy still further in several important particulars. Since the passage of that act, it would scarcely be doubted that the bill would lie: Acts of 1836, p. 143. But this bill is not filed alone, with a view to set aside a fraudulent conveyance, even if that be one of its objects, which is not certain. The bill charges that five of the negroes were holden by Rayford for Chilton, and that the other two, if purchased, had not been paid for. A decree may then be made for the specific delivery of those held in trust, and the payment of the money due for the others, without any reference to the question of fraud. The demurrer admits the truth of these charges, and thus affords ground of jurisdiction, even if it could not be entertained on the principles just laid down. We believe, however, that under the statute, the bill may be sustained upon either or both grounds.

It is next insisted that when both parties are non-residents, the court has no jurisdiction, and they can not call upon the tribunals of this state to settle their disputes. This position upon the law, independent of statutory enactments in this state, may be correct, though it is not necessary for us to inquire into that point. But its application is not apparent, because in this, and all similar proceedings, there are at least two parties defendants, one of whom must reside in this state, and the other be an absentee. The principle then, if it exists in the utmost latitude, does not apply; for the contest is not between non-residents, but between a non-resident plaintiff, and an absent and a home defendant. The statute is in its terms too plain to be doubtful; yet authority may be found to warrant our construction. The statute is an exact copy of one which has existed in Virginia since 1744, and their courts have uniformly held that a non-resident complainant might proceed under it, against a non-resident debtor, provided there was also a resident defendant: *Williamson v. Bowie*, 6 Munf. 176; *Watts v. Kinney*, 3 Leigh, 306 [23 Am. Dec. 266]; *Gibson v. White*, 3 Munf. 94. The same construction has been placed upon the act by the supreme court of the United States in reference to the district of Columbia: *Wilson v. Koontz*, 7 Cranch, 202. Kentucky has the same, or a very similar act. Their court, in placing a construction upon it, uses this explicit language: "The proceeding against defendants who may be out of the country, lies as well for those who are not residents of this state, as for those who are, and as well against those who never were, as against those who were or have been." *Aspinwall v. Chase*, 3 A. K. Marsh. 266.

It is insisted, lastly, that a court or judge has no right, at the time of the filing of the bill, to direct an attachment to issue. Upon this point we have felt some difficulty, but after a careful examination of the statute, we believe the position is correct. By the practice in the state from which we borrowed the statute, a subpoena in chancery, indorsed by the clerk, "that it is to stop the debts and effects of the absent defendant, in the hands of the defendant within the state, to satisfy a debt due from the absentee to the complainant," when served, operates as an attachment or garnishment, and restrains any transfer by the home defendant. If he afterwards puts the property or effects out of his hands, he renders himself liable: *Williamson v. Bowie*, 6 Munf. 176; *Kennedy v. Brent*, 6 Cranch, 187. But when the home defendant has been served with process, and at the return time an affidavit is made as to the absence of the

other defendant, the court may then make an order for the safe keeping of the effects, and require surety for their production to answer the decree, or may direct them to be delivered to the complainant upon his giving surety for the return, as the court may direct. From the issuance of the process till the return term of the court, the complainant has only a remedy against the home defendant, if he makes way with the property or effects; but at that time the court may require surety of such defendant, or make such other order as it may deem just. The order discharging the attachment was therefore correct; but, at the same time, the court should have made a further order to insure the delivery of the property to answer the final decree. Before a final decree, the court must be satisfied that the complainant has established his claim against the absent defendant; a decree must then be entered therefor. If the resident defendant by his answer denies an indebtedness, or claims the property—or denies having property of the absentee—the court must proceed to decide upon the facts, as in case of other disputed facts, and decree accordingly.

The order of the vice-chancellor, in sustaining the demurrer, and dismissing the bill, will be reversed, and the cause remanded for further proceedings, in consonance with the principles herein laid down. The order discharging the attachment is affirmed, but the court below should make such further order as may be necessary to preserve the fund during the pendency of the suit. We do not mean to express any opinion, which would prejudice the right of the party to obtain an injunction, to prevent the transfer or removal of the property upon a proper case, at the time of the bill filed.

Decree reversed, with costs.

JURISDICTION OVER PROPERTY OF NON-RESIDENT DEFENDANTS: See *Zerachie v. Bowers*, *post*, 111.

JOINDER OF PARTIES IN EQUITY.—Claimants under one title may join several defendants, claiming the estate under separate and distinct purchasers of parcels of it: *McGowan v. McGowan*, 48 Miss. 553; so also heirs claiming by a common ancestor, may unite defendants claiming different portions of the estate by distinct titles: *Richardson v. Brooks*, 52 Id. 123; nor is a bill multifarious, making all the vendors and vendees defendants, when an insolvent debtor on the same day conveyed part of his land to his father-in-law, and another part to his son, who both shortly after conveyed to the insolvent's wife, and she afterwards conveyed part to her sister-in-law, who took with notice: *Waller v. Shannon*, 53 Id. 500; nor where heirs of a mother united their father, a creditor, in a decree against him, and a purchaser at a sale under the decree, the heirs claiming a resulting trust in the estate by the investment of their mother's money toward the purchase thereof, and that the sale

was for an inadequate price, by reason of the complication of the title: *Taylor v. Smith*, 54 Id. 50. Vendor with covenants of warranty and the vendee may unite in a bill to set aside a sale of land, made by a sheriff under an execution against the vendor: *Winston v. Olley*, 25 Id. 451. The general rule seems to be that if the parties have a common interest, touching the matter of the bill, although they claim under distinct titles, and have independent interests, they may be united: *Buller v. Spann*, 27 Id. 234; *Delafield v. Anderson*, 7 Smed. & M. 630; *Forniquet v. Forestall*, 34 Miss. 87; *Nevitt v. Gillespie*, 28 Am. Dec. 696; *Müller v. Helm*, 2 Smed. & M. 687. As to joinder of defendants in equity, see the note to *Fellows v. Fellows*, 15 Am. Dec. 427.

FOREIGN ATTACHMENT LAW OF MISSISSIPPI.—This case is cited in *Freeman v. Malcom*, 11 Smed. & M. 53, that equity has jurisdiction of a foreign attachment bill to enforce a purely legal demand, where there was a resident defendant having property of a non-resident, the complainant being a non-resident; and in *Freeman v. Guion*, Id. 58, it was held the same jurisdiction existed where the complainant was a resident. The principal case is cited in *Trotter v. White*, 10 Id. 611, that the court may order the resident defendant to give security for the property pending the suit.

DOE EX DEM. MORTON v. JACKSON.

[1 SMEDES AND MARSHALL, 494.]

WITNESS INTERESTED IN THE EVENT OF THE SUIT is competent when called by the party whose interest is adverse to his.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN DESCRIPTION IN A DEED in order to apply it to the subject-matter of the grant.

ADDITION OF FALSE OR MISTAKEN DESCRIPTIONS in a deed will not frustrate the grant, if there are others sufficiently clear to identify the thing intended to be granted.

EJECTMENT. The facts sufficiently appear in the opinion.

Battaile, for the plaintiff in error.

G. S. Yenger, for the defendants in error.

By Court, CLAYTON, J. This was an ejectment brought to recover a lot of ground within, or adjoining, the town of Manchester. The plaintiff relied upon a deed from Hiram G. Runnels and others, the original proprietors of the town, in which the property conveyed in said deed was thus described: "A certain piece or parcel of land, situate on the Yazoo river, in Yazoo county, above the lots and commons of the town of Manchester, as designated on the map thereof, and being the remainder of the tract of land on which said town was laid out, exclusive of lots, commons, streets, etc., being designated more particularly on the map of said town, as swamp land, and a tract not numbered, supposed to contain about one hundred acres, more or less, bounded by the Yazoo river on one side, by

the lots, commons, and streets of said town on the other side, extending up the river to the lines of the original survey of said tract of land." The map of the town was introduced and read in the evidence, by which it was shown that in point of fact there was no land upon it designated as swamp land.

The defendant then offered Hiram G. Runnels, one of the grantors in the deed to plaintiff, as a witness, and asked him "by what name the ground lying between the town and the river (part of which was the subject of the suit) was known, at the time of the execution of the deed to the plaintiff?" The plaintiff objected to the question, and to the introduction of Runnels as a witness at all; but the court overruled the objection, and directed the witness to answer the question. A verdict was found for the defendant, and the case brought by writ of error to this court. Two objections are here urged against the admission of this testimony: 1. That as the grantor in the deed, the witness was incompetent upon the ground of interest; and 2. That parol evidence was inadmissible to vary or explain the terms of the deed.

It is important to consider, when an objection is made to a witness upon the ground of interest, in whose behalf he is called. Although he may be interested in the event of the suit, yet he is competent when his interest is adverse to the party calling him: *Sleight v. Hartshorn*, 1 Johns. 149; *Work v. Maclay*, 2 Serg. & R. 415; 3 Vern. 104; 2 Ph. Ev. by C. & H. 81. In this instance Runnels was called by the party claiming in opposition to his deed to the lessor of the plaintiff; his interest was therefore adverse to the party who introduced him. If his grantee was defeated, he would be liable upon his covenant of warranty to him; but if his grantee recovered, it does not appear that he would be liable in any way to Jackson. But even if he would, his interest would be balanced between them; and in either of these aspects he was competent.

The other point is equally clear upon the authorities. The testimony in such instances is not introduced to explain, or limit, or vary the deed—but to point out the subject-matter on which it is to operate. The rule is thus laid down by the supreme court of the United States: "Whenever there is a doubt as to the extent of the subject derived by will, or demised, or sold, it is matter of extrinsic evidence, to show what is intended to be included under the description as parcel of it:" *Bradley v. Washington Steamboat Company*, 13 Pet. 97. In *Ryers v. Wheeler*, 22 Wend. 150, the court says: "You must, in the

most accurate description, go out of the instrument in order to apply it to the subject-matter of the grant or devise." In *Sanford v. Raihes*, 1 Meriv. 646, it is said: "Not only to be competent, but necessary to admit extrinsic evidence to ascertain the fact, and through that medium to ascertain the subject of devise." See also 3 Stark. Ev. 1021. This list of authorities might be much extended; but it is enough to show abundantly, that evidence in this instance, as in cases of boundary, is admissible to give effect to the deed: See *Newman v. Foster's Heirs*, 3 How. 390 [34 Am. Dec. 98].

The circumstance that the deed recites, that the land was designated on the map as swamp land, when there was no such designation, can have no controlling influence in the cause. "If there are certain particulars sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant:" *Jackson v. Marsh*, 6 Cow. 284. See *Jackson ex dem. McNaughton v. Loomis*, 18 Johns. 81; *Loomis v. McNaughton*, 19 Id. 448; *Fish v. Hubbard*, 21 Wend. 652. The omission upon the map, of what it is referred to as containing, can not defeat the deed.

On the whole case, we are of opinion that the judgment should be affirmed.

GRANTOR AS A WITNESS: See *Herbert v. Herbert*, 12 Am. Dec. 192; *Jackson v. Stackhouse*, 13 Id. 514; *Jackson v. Rice*, 20 Id. 683; *Kendall v. Field*, 30 Id. 728.

PAROL EVIDENCE TO EXPLAIN DESCRIPTIONS USED.—Grantor described the premises in the deed as the farm on which he then dwelt; held admissible: *Doolittle v. Blakesley*, 4 Am. Dec. 218. Grant made to a married woman in her maiden name, parol evidence admitted to show that she was known to the grantee by that name: *Scanlan v. Wright*, 25 Id. 344. As to the boundaries and the place of executing the survey, although differing from the courses described in the patent: *McNeil v. Dixon*, 10 Id. 740. See also *Dale v. Smith*, 12 Id. 64, and note.

Parol evidence is admissible to explain the situation, locality, and boundaries of land described in a plat and certificate of survey, made under an order of court: *Spears v. Burton*, 31 Miss. 547. Omission of a township and range in describing land may be supplied by parol evidence: *Foute v. Fairman*, 48 Id. 550. But a deed which describes the land conveyed as a "part of section 18 in township 7, of range 2 east, containing one hundred and eighty acres," is void for uncertainty: *Brown v. Guice*, 46 Id. 299. So also where the description was "my land, the entire tract, seven hundred and twenty-eight acres:" *Barnett v. Nichols*, 56 Id. 623.

FALSE DESCRIPTIONS AND SURPLUSAGE.—It is a settled rule that the addition of a false description will be rejected and the instrument take effect, if a sufficient description remains to identify the thing intended to be described. The rule is founded upon the maxim, *Falsa demonstratio non nocet*. But the gist of the rule is that a sufficient description exists in the instrument, irre-

spective of the false description, to sufficiently express the maker's intent; thus in *Mosley v. Massey*, 8 East, 149, the testator had an estate in the county of Monmouth, of which he was seized in fee in possession, and another in the county of Radnor, of which he was also seized in fee, subject to the use of his marriage settlement, which left him in equity a disposing power over the reversion only. Both estates formerly belonged to his uncle, from whom he inherited the former, and purchased the latter from a co-heir. In his will he described the estate of Monmouth as in Radnor, and the estate in Radnor as in Monmouth counties, also describing each as formerly belonging to his uncle. After parol evidence had established that the local descriptions of the two estates had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth, and *vice versa*, the court held it was sufficiently to be collected from the words of the will itself, which estate the testator meant to give to one devisee and which to the other, and the local description was rejected as unnecessary. In *Doe v. Galloway*, 5 Barn. & Adol. 43, the description in the lease was: "All that part of Blenheim Park situate in the county of Oxford, now in the occupation of one S.," with certain specified abutments, "with all the houses thereto belonging which are in the occupation of said S.," and it was held that a house within the abutments, but not in the occupation of S., was included. In *Day v. Trig*, 1 P. Wms. 286, the testator devised all his "freehold houses in Aldersgate street, London," but the testator had no freehold houses upon that street, they being all leasehold. Justice Tracy, in delivering the opinion, said: "Had there been any freehold houses to satisfy the will, the leasehold houses would not pass; yet the plain intention of the testator being to pass some houses, and he having no freehold houses there, the word freehold should rather be rejected than that the will be wholly void." Anderson, C. J., in *Godbolt and Gouldsbrough*, 131, says: "An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator;" and illustrates it thus: "If one devises land to the heirs of I. S., but the clerk writes it I. S. and his heirs, it may be helped by averment, because the intent of the devisor is written, and more: and it shall be naught for that which is against his intent and good for the residue. But if the devise be to I. S. and his heirs, and it is written to the heirs of I. S., there an averment shall not make it good to I. S., because it is not in writing which the statute requires."

Chief Justice Parsons lays down the rule in *Worthington v. Hylyer*, 4 Mass. 204, to be, "if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected." There the land was described in a mortgage as all his farm in W., on which he lived, containing one hundred acres, with his dwelling-house and barns standing thereon. And added, "that the farm was lot No. 17, etc.," which clause was rejected by the court, upon its being shown that the farm comprised no part of lot No. 17. The same rule was approved and acted upon in *Loomis v. Jackson*, 19 Wend. 448, where the mortgage, after correctly bounding the premises, added that they were lot No. 51 of a certain patent, and in fact they were lot No. 50, the former was rejected as surplusage. To the same effect is *Jackson v. Marsh*, 6 Cow. 281; *Lush v. Druse*, 4 Wend. 313; *Hunt v. Shackleford*, 56 Miss. 397; *Blague v. Gold*, Cro. Car. 447; *Swift v. Eyles*, Id. 548. It is a well-established rule that all surveys, courses, and distances must yield to natural and ascertained boundaries or objects: *Preston's Heirs v. Bowmar*, 6 Wheat. 580; *Wells v. Compton*, 3 Rob. (La.) 188; *Kellogg v. Smith*, 7 Cush. 375; *Newhall v. Ireson*, 8 Id. 596; *McIver's Lessee v. Walker*, 9 Cranch, 173; *Haynes v. Young*, 36 Me. 557. But

this rule is subject to exception, when an adherence to it would be plainly absurd: *Davis v. Rainsford*, 17 Mass. 210. Judge Wilde, in delivering the opinion in this case, said: "The reason given why monuments are to control the courses and distances in a deed, is that the former are less liable to mistakes. If, then, it appears that no mistake can reasonably be supposed to have been made in this case, no reason remains for the application of the rule." But courts will not insert a word where a blank has been left or where a wrong word has been inserted, and a sufficient description does not appear in the instrument. Parol evidence is not admissible in such cases to show the intent of the maker of the instrument, for this would be to make the instrument for him: *Miller v. Travers*, 8 Bing. 244; *Doe v. Chichester*, 4 Dow's P. C. 65; *Doe v. Lyford*, 4 Mau. & Sel. 550; *Altman v. Cummings*, 9 How. (U. S.) 479. For a general discussion of the rules governing where the description of land in a deed is inconsistent or uncertain, see the note to *Heaton v. Hodges*, 30 Am. Dec. 734.

ZECHARIE v. BOWERS.

[1 SHERMAN AND MARSHALL, 584.]

CHANCERY HAS NO JURISDICTION OVER PERSONS OF NON-RESIDENT DEFENDANTS, nor over their property within the state, unless given by statute, when there has been no previous judgment at law within the state.

JURISDICTION OVER THE LAND OF NON-RESIDENT DEFENDANTS, situate within the state of Mississippi, has been given in equity by statute before obtaining a judgment at law.

STATUTES SUBSTITUTING OTHER THAN A PERSONAL SERVICE OF PROCESS, must be strictly complied with, to give the court jurisdiction, and this compliance must appear affirmatively in the proceedings.

THE facts sufficiently appear in the opinion.

W. R. Miles, for the appellants.

No counsel appeared for the appellee.

By Court, CLAYTON, J. This was a bill filed by the complainants, to subject a tract of land, belonging to the defendant, to the payment of a debt alleged to be due to them. All the parties, complainants and defendant, are non-residents. Judgment has been rendered upon the claim in Louisiana; but we throw that circumstance out of view, as having no influence upon the decision to be made: *Turbell v. Griggs*, 3 Paige, 207 [23 Am. Dec. 790]; *McElmoyle, use, etc. v. Cohen, Administrator*, 13 Pet. 812. There was an order of publication in the chancery court, and a decree *pro confesso* entered, which, however, was afterwards set aside, and the bill dismissed. The ground of dismissal was the want of jurisdiction, the chancellor being of opinion that his court had no jurisdiction over the person of the defend-

ant, and none over the land sought to be subjected, unless there had been a previous judgment at law in this state.

Apart from any legislative enactment, this view was certainly correct. By the recognized principles and rules of proceeding in the English chancery court, this case would be beyond the sphere of jurisdiction. But it is to be considered, whether we have not a statute which produces a change in this respect. By the sixty-third section of the law in regard to the superior court of chancery, a mode of proceeding is prescribed, which, in our opinion, embraces this case: How. & Hutch. 520. The language of the act is, "If any suit which hath been, or hereafter shall be commenced, for relief in equity, in the superior court of chancery, against any defendant, or defendants, who are out of this state, and others within the same, having in their hands effects of, or otherwise indebted to, such absent defendant, or defendants, *or against any such absent defendant, or defendants, having lands or tenements within the state;*" then a certain defined course shall be pursued to obtain a decree in the one instance against the home defendants and the personal estate, and in the other, to subject the land to the payment of the debt. This, like many other of the earlier statutes of this state, was copied literally from a Virginia act. In that state, it seems to be settled, that the court of chancery has jurisdiction in a case like this: *Kelso v. Blackburn*, 3 Leigh, 299. The history of the act in that state is briefly this: In the year 1744, just one century ago, the first statute which authorized proceedings in chancery against absent debtors, was passed. That statute, however, only gave a remedy in equity against a defendant residing out of the state, when there was another within the state "having in his hands effects of, or otherwise indebted to, such absent defendant." Thus the law continued until 1819, when an amendment was made, introducing the words inserted above in italics, and extending the provision so as to make it include absent defendants, "having lands and tenements within the state:" *Id.* 306. Since that period there has been no doubt, in that state, of the jurisdiction of the court in such case.

We have been referred to two cases, as standing opposed to this conclusion: *Bustard v. Dabney*, 4 Ham. (Ohio), 68, and *Austin v. Bodley*, 4 T. B. Mon. 434. Neither of the bills in these cases seems to have been filed with reference to a statute, like the one on which we have been commenting. In the Ohio case, the bill was dismissed, because the complainant, it was said, had an ample remedy at law, with a distinct intimation

that jurisdiction would have been entertained but for that circumstance. In the other case, which was from Kentucky, the bill was dismissed, because it was filed in the circuit court of a county in which the land did not lie. In giving the opinion, the court remarks: "There being, therefore, no person within the county upon whom process could be served, and no part of the land possessed by the appellants being in that county, there can not be said to be a cause of action within that circuit over which the court could take jurisdiction:" 4 T. B. Mon. 439. It may be safely concluded, that neither of these cases touches the point here involved.

Upon another branch of this statute, in a case in which there was a home defendant, as well as absent defendants, we had occasion, very recently, to give our opinion: *Comstock v. Rayford et al.*, 1 Smed. & M. 423 [*ante*, 102]. Many of the principles there laid down, especially those in regard to the debt, and the evidence of the parties, are equally applicable to this case. The jurisdiction was there sustained. The bill in this case was not framed to meet the requisitions of the statute; and in the brief on which it was submitted, it is assumed by the counsel for the appellants, that there is no statute which embraces such a case. In consequence of this view, the allegations of the bill fall short of those which are requisite under the statute: 2 Rob. Pr. 203; *Kelso v. Blackburn*, 3 Leigh, 306. These imperfections, however, are the subject of amendment.

But while we think that the chancery court, under a proper state of case, would have had jurisdiction, yet, in this particular instance, the decree is correct in dismissing the bill. The complainants brought their case to a hearing, upon a *pro confesso* order, and sought to sustain it upon proof of publication in a newspaper alone. The statute requires, in express terms, that "there shall be a copy of the order posted at the front door of the court," besides a publication in some public newspaper. It is the uniform and unbroken course of decision, that, under all statutes which authorize the substitution of some other means for personal service of process, as a foundation for the jurisdiction of the court, the most exact compliance with those requisitions will be enforced. Unless such compliance be shown affirmatively, the proceeding will not be sustained: See *Gwin v. McCarroll*, opinion, book B, 1 Smed. & M. 351.

For the failure in this particular, the decree dismissing the bill without prejudice, will be affirmed. We have gone more at length into the doctrine on this subject than we otherwise should,

because it is a case of first impression in our court; and it is important that the principles which govern the practice should be understood.

Decree affirmed.

JURISDICTION OVER NON-RESIDENT DEFENDANTS: See *Comstock v. Bayford*, *ante*, 102; see also note to *Bartlet v. Knight*, 2 Am. Dec. 45.

This case is reported again in 3 Smed. & M. 641, by reason of the syllabus in the first report being a total misapprehension of the decision.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

HICKERSON *v.* BENSON.

[8 MISSOURI, 8.]

ELECTIONS ARE NOT GAMES WITHIN THE MEANING OF THE STATUTE against games and gambling devices.

BETS, PREVIOUS TO AN ELECTION, UPON ITS EVENT, OR MADE SUBSEQUENTLY upon matter connected with the canvass, are illegal and void, upon principles of public policy and morality.

BETS ON ELECTIONS CAN NOT BE DETERMINED AT LAW; the courts leave the parties as they find them, unless the party rescind the contract before the event is known upon which the wager depends. In the event of such rescission, the party rescinding may recover the amount which he wagered.

THE facts are stated in the opinion.

Clark and Belt, for the plaintiffs in error.

Hayden and Davis, for the defendants in error.

By Court, **NAFTON, J.** This was an action of trover, brought by Hickerson, to recover the value of a horse alleged to have been converted by the defendants to their use. The plea was, not guilty. The parties went to trial, and the verdict and judgment were for the defendants. It appears, from the bill of exceptions taken at the trial, that on the sixteenth of November, 1840, a bet was made between the plaintiff and defendants, on the presidential election, the terms of which were as follows: The plaintiff bet a certain horse against five hundred dollars,

and delivered the horse to the defendants on the following conditions, which were reduced to writing at the time:

"On the first day of March, we, or either of us, promise to pay A. Hickerson, or order, the sum of five hundred dollars, value received. As witness our hands and seals, this seventeenth November, 1840.

JAMES H. BENSON.

D. WORKMAN."

The conditions of the above note are as follows: "Benson and Workman bet the sum of five hundred dollars, against A. Hickerson's bay stallion Clifton, that W. H. Harrison receives, for president, fifty electoral votes more than M. Van Buren. If the said W. H. Harrison does receive fifty electoral votes more than M. Van Buren, the note to be void and of no effect." On the twenty-third of December, Hickerson notified the defendants in writing, that the horse must be returned, because they (the defendants) had information in relation to the result at the time the bet was made, which he (the plaintiff) had not. Some testimony was introduced with a view to establish a fraud on the part of the defendants, but the jury found, under the instructions of the court, a verdict for the defendants, and the plaintiff seeks to reverse the judgment, on the ground, that the law was not correctly expounded to the jury by the circuit court. The instructions of the circuit court were, in substance, that the bet was not within our statute concerning gaming, and that, if the jury were satisfied there were no fraudulent concealments on the part of the defendants, the plaintiff could not recover.

We are of opinion, that the instructions of the circuit court were correct. We are not apprised of any rule of construction, or principle of public policy, which could warrant a court in declaring an election to be a game within the meaning of our statute. It is apparent, that if such a construction could be placed upon this act, all wagers whatsoever, not only such as contravene principles of public policy and sound morality, but such as are made on subjects of entire indifference, and events in themselves of no importance, might, with equal propriety, and for similar reasons, be embraced within its provisions. A horse-race has been held to be a game or gambling device within the meaning of our statute, but an election is a political institution, essential to the existence and operation of our government, and recognized by the constitution and laws. It is difficult to see how such an institution could have been in the contemplation of the legislature when they enacted laws against games and

gambling devices. There was, therefore, no error in the opinion of the circuit court on this point. The bet was, however, clearly against public policy, and consequently void at common law. Whether a bet be made previously to an election, on its event, or subsequently on some collateral matter connected with the canvass, repeated adjudications, both in England and this country, declare such wagers illegal, upon principles of public policy and sound morality: *Rust v. Gott*, 9 Cow. 173 [18 Am. Dec. 497]; *Allen v. Hearn*, 1 T. B. 56; *Bunn v. Riker*, 4 Johns. 438 [4 Am. Dec. 292].

But the settled rule of law, in such cases, is, for the courts to leave the parties where they find them, on the maxim, "*Potior est conditio defendentis*." If, however, either party will rescind the contract, before the event is known on which the wager depended, the courts will interfere, on the ground, that the parties are not then *in pari delicto*: the risk has not been determined, and the parties have a *locus penitentiae*: *Aubert v. Walsh*, 3 Taunt. 283. So also where the money or property has not passed from the hands of the stakeholder, the losing party has been allowed to recover: *Vischer v. Yates*, 11 Johns. 23. In the present case it will be observed, that the wager was not on the final result of the presidential election, but it was on the result of the vote in the electoral colleges.

By the laws of the United States, the colleges meet at the seats of government of the several states on the first Monday of December, and vote; their votes, sealed up, are then transmitted to Washington, and not opened in the presence of the two houses of congress, until the second Wednesday in February, when the result is legally ascertained and declared: See Story's L. U. S. —. Whatever, then, might be the result of the presidential election, it is plain that the result of the electoral vote is settled by the electoral colleges on the first Wednesday of December, and that event could scarcely have been unknown to the plaintiff on the twenty-third of the same month, when he notified defendants of his intention to rescind the contract.

The judgment of the circuit court is affirmed.

TOMPKINS, J., dissenting.

ILLEGAL CONTRACTS CAN NOT BE ENFORCED. The courts leave the parties as they find them: See *Black v. Oliver*, 35 Am. Dec. 38; *Norris v. Norris' Administrators*, Id. 138; *Groton v. Waldoborough*, 26 Id. 530; *Faurie v. Morin*, 6 Id. 701; *Gray v. Roberts*, 12 Id. 383; *Roby v. West*, 17 Id. 424; *Boyd v. Barclay*, 34 Id. 762, and note.

THE PRINCIPAL CASE IS CITED in *Hayden v. Little*, 35 Mo. 422, to the effect that before the passage of the eighth section of their gambling act, declaring bets and wagers on elections to be within the meaning of the act, such wagers were void in Missouri as contrary to public policy and sound morality. See also the next case.

HICKERSON AND MESSERLEY *v.* BENSON, WORKMAN, AND McCAULEY.

[8 MISSOURI, 11.]

BETS ON ELECTIONS.—The rule that a person may declare his dissent from an illegal wager before the event happens, and recover back his money, does not apply if the relative condition and chance of the two parties is materially changed, or the value of the risk is greatly altered; then the rule *potior conditio defendantis* prevails.

THE facts are stated in the opinion.

Clark and Bell, for the plaintiffs.

Davis, for the defendants.

By Court, NAPTON, J. The record of this case presents substantially the same points which the court has determined in the case of *Hickerson v. Workman and Benson*, decided at the present term [*ante*, 115]. The wager, in the present case, was made on the twelfth of November, 1840, and was that W. H. Harrison would receive, for president of the United States, thirty electoral votes more than Martin Van Buren.

On the trial, the court was called upon to say, that, until the first day of January, 1841, Hickerson had a right to rescind the contract. This is the only point in which it varies from the case of *Hickerson v. Benson and Workman*, and for this refusal of the court so to instruct the jury, the plaintiffs ask a reversal of the judgment. The case of *Rust v. Gott*, 9 Cow. 171 [18 Am. Dec. 497], is relied on, to sustain the position, that until the votes have been canvassed by the highest authority, and the result is officially announced, it can not be known legally who is elected, and therefore, where a bet is made on the final result of an election, either party may rescind before that result has been thus legally and officially ascertained. There is nothing, however, in that case to warrant such a conclusion. It was an action by the winner against the stakeholder, after the stakeholder had returned the note to the maker. The court would not allow a recovery, on the ground that the wager was illegal, and against the policy of the law, though made subsequently to

the election. The tendency of such bets made after the election, but before the result was legally ascertained, was held to be equally pernicious and immoral with those made anterior to the election. But the court did not undertake to determine whether the loser could have recovered against the stakeholder if he had refused to give up his note. This case falls within the general principle asserted by Chief Justice Mansfield, in the case of *Aubert v. Walsh*, 3 Taunt. 284. After the contract is executed, the property or money delivered, and the risk determined, a losing party is not at liberty then to rescind: his repentance comes too late; the offense against the policy of the law has been consummated, and there is no motive to induce a court of justice to interfere between the parties.

It must be admitted, that the ancient rule on the subject of illegal wagers, not permitting the parties to such contracts to have the aid of the law to help them out of their difficulties, appears the most reasonable and the least objectionable. The law, however, is now well settled that if a man declares his dissent from an illegal wager, before the event happens, he may recover back his money. But this rule must be attended with some qualifications, otherwise it would open the way to the grossest fraud. If, for example, a wager is made that A. will live ten years, and at the end of nine years eleven months and twenty-nine days A. is still alive, and the party betting that A. would not live the ten years gives notice that he withdraws his bet, would this be within the spirit and meaning of the rule? The risk has not determined, the event has not happened, but the value of the risk is greatly altered. To allow a rescission of the bargain in such a case, and permit the gambler, who foresees his loss with a moral certainty, to withdraw his bet through the aid of the law, would be a perversion of the first principles of justice, and making a court the instrument of encouraging fraud. After the relative condition and chance of the two parties has materially changed, the ancient rule of *potior conditio defendantis* must prevail. It can hardly be doubted but in this case Hickerson, the plaintiff, on the twenty-third day of December, was fully aware that he had lost his wager. The refusal of the court to instruct the jury, that he had until the first day of January to recall the bet, was, then, no error.

Judgment affirmed.

TOMPKINS, J.: I dissent.

For citations, see preceding case.

GUDGELL v. MEAD.

[8 MISSOURI, 53.]

COURTS OF CHANCERY CAN NOT DECREE PARTITION OF PERSONAL CHATTELS held in joint tenancy or tenancy in common.

INTERLOCUTORY DECREE THAT PARTITION be made of personal chattels can not be appealed from.

THE facts are stated in the opinion.

By Court, SCOTT, J. The appellees filed a bill in chancery against the appellants for a partition of chattels, consisting of an anvil, bellows, vise, hammers, etc. The appellants demurred to the bill, and their demurrer being overruled, they made no further answer; whereupon the court decreed a partition, and appointed commissioners to make it. From this decree the appellants appealed to this court. The question presented by the record is, whether a partition of personal chattels can be decreed by a court of equity, between joint tenants, or tenants in common.

A writ of partition for joint tenants, or tenants in common, of real estate, did not lie at common law. This writ was given only to parceners, for, as the tenancy in coparcenery was created by law, so the law gave the tenants a writ of partition. But, as joint tenants and tenants in common became such by their own act, the law provided no means by which they could obtain a separate interest in that which had become joint and undivided by their own consent: Co. Lit., Thomas' ed., vol. 1, p. 806. The statutes of 31 and 32 Henry VIII. gave the writ of partition to joint tenants and tenants in common of real estate. The last of these statutes gave the writ to the joint owners of a lease for years. From this it would appear, that by the common law, the joint owners of chattels had no process for compelling partition: Id. It would be extremely difficult, in many cases, to make partition; many chattels are not susceptible of a division; of such, partition could only be made by allowing each owner to enjoy the chattels, for a given period, alternately. A power to sell is not incidental to the jurisdiction to make partition. If partition in kind can not be made, a court of equity, without the authority of statute law, can not decree a sale: *Thompson v. Hardman*, 6 Johns. Ch. 436. In the case of *Dinkle v. Timrod*, 1 Desau. 109, a sale was decreed where partition could not be made advantageously, and the land was unproductive to the children.

In *Coleman v. Hutchenson*, 3 Bibb, 216 [6 Am. Dec. 649], the

court said, no case had been found where a sale of the property has been adjudged or decreed, under the doctrine of partition at law, or in equity. From the manner in which partitions of estates in England have been made, it would seem a court of chancery could not decree a sale; otherwise modes of partitioning estates so inconvenient as have sometimes been made by her courts of chancery, would never have been submitted to. Take one for example: A commission of partition of a house having been executed, exceptions were taken, on the ground, that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase in the house, and all the conveniences of the yard; the exceptions were overruled; the chancellor saying, they did not know how to make a better partition between the parties: *Turner v. Morgan*, 8 Ves. 143; *Manners v. Charlesworth*, 7 Cond. Eng. Ch. 69; S. C., 1 My. & K. 330.

In *Smith et al. v. Smith*, 4 Rand. 95, it is said, "that tenants in common of a personal thing can not compel partition by proceedings at common law, and therefore, equity has jurisdiction." The point was not made in the cause, and the expression is uttered in argument, and no authorities are cited. But, with deference, it does seem that the court took the point in dispute for granted. The question is not, what court has jurisdiction? but, whether a partition of things merely personal can be made at all? We have not been able, after some research, to find a case in which a partition of chattels has been decreed, except leases for years, for which partition was given by the statute. In the case of *Coleman v. Hutchenson*, 3 Bibb, 216 [6 Am. Dec. 649], the court says: "The right of partition of slaves is given by statute. We have no statute allowing partition of mere personal chattels." Abbott, in his work on shipping, pt. 1, c. 3, sec. 2, says: "A personal chattel, vested in distinct proprietors, can not possibly be enjoyed advantageously by all, without a common consent and agreement among them. To regulate their enjoyment, in case of disagreement, is one of the hardest tasks in legislation; and it is not without wisdom, that the law of England, in general, declines to interfere in their disputes, leaving it themselves, either to enjoy their common property by agreement, or to suffer it to remain unenjoyed, or to perish by their dissensions, as the best method of forcing them to a common consent for their common benefit."

Perhaps in analogy to the power exercised by a court of equity, when it winds up the concerns of partnership, in decreeing a sale

of the joint property, and a conversion of it into money; so would such a court, if a bill for an account was brought by one part owner against another, decree a sale of the property of whose profits an account was sought, so as to do complete justice between the parties: 3 Kent, 64. That such a step would be necessary, seems to follow from the established principle, that a bill brought for an account of partnership transactions is demurrable, unless it prays a dissolution of copartnership: *Loscombe v. Russell*, 6 Cond. Eng. Ch. 4; S. C., 4 Sim. 8. In proceedings in partition, both at law and in equity, there are two judgments and decrees; the one interlocutory, and the other final. The first is *quod partitio fiet, inter partes de tenementis*, upon which a writ, or commission, goes, commanding that partition be made, and upon the return of this writ, or commission, executed, if the proceedings are approved by the court, the second judgment is given—*quod partitio firma, et stabilis in perpetuum teneatur*. This is the principal judgment, and before it is given, no writ of error does lie: 1 Thomas' Coke, 807, 808.

The appellants took their appeal before a final decree was entered; it was an interlocutory decree, not final. No partition had, in fact, been made; there was only a decree requiring it to be done, and no further proceedings were had under it when they took their appeal.

The appeal, then, must be dismissed, at the costs of the appellants, and the cause be remanded, with directions to dismiss the bill, at the costs of the complainants.

THE PRINCIPAL CASE IS CITED and approved in *McMurtry v. Glascock*, 20 Mo. 432, to the effect that judgment in a partition suit that partition be made is interlocutory, from which no appeal can be taken; and to the same effect in *Stephens v. Hume*, 25 Mo. 349; cited in *Bankston's Adm'r v. Furris*, that at common law an action for partition of chattels would not lie.

The principal case, in so far as it denies the power of courts of equity to partition personal property, is not in harmony with the authorities. The common law provided no means of redress in behalf of a co-tenant of personalty as against another co-tenant thereof, unless the latter had been guilty of an actual or practical destruction of the common property: *Hall v. Pidcock*, 21 N. J. Eq. 314. The inattention of the common law to this species of property was carried still further. Part owners, in addition to being without any legal remedy by which either could enforce a fair and equitable use and enjoyment of their common chattels, were also without any legal means of compelling partition thereof. Neither the common law, nor the statutes of Henry VIII., nor of William III., had any applicability to personal property: Allnatt on Partition, 48. The necessity of some remedy by which partition of this species of property could be compelled was much greater than in the case of real estate; for real estate was susceptible of a common possession and enjoyment, and in case of a total exclusion of either co-tenant,

he had his remedy at law by an action of ejectment. The entire absence of any remedy at law induced courts of chancery to take jurisdiction of actions for the partition of personal property. At what time or under what circumstances this jurisdiction was first assumed, we are unable to state; but that it existed and was exercised by the courts of chancery both in England and in the United States is undisputed: *Smith v. Smith*, 4 Rand. 102; *Oonover v. Earl*, 26 Iowa, 167; *Tripp v. Riley*, 15 Barb. 334; *Fobbes v. Shattuck*, 22 Barb. 568; *Marshall v. Crow's Adm'r*, 29 Ala. 279. "A court of equity is competent to give relief in such cases, by decreeing a partition of the property, or a sale thereof where such partition is impracticable, and a division of the proceeds. The powers of a court of equity were conferred and exist to meet just such cases, where no adequate remedy exists at law:" *Timney v. Stebbins*, 28 Barb. 290.

LITTLE ET AL. v. SEMPLE.

[8 MISSOURI, 99.]

COMMON CARRIER CONTRACTING TO DELIVER GOODS AT A CERTAIN PLACE is liable for them after they have been delivered at an intermediate point to another carrier to forward to their destination, and the words "with privilege of reshipping" contained in the bill of lading do not release his liability for their loss in the hands of such second carrier.

ASSUMPSIT. The facts appear in the opinion.

Hudson and Holmes, for the plaintiffs in error.

Spalding and Tiffany, for the defendant in error.

By Court, NAPTON, J. The plaintiffs brought an action of *assumpsit* in the St. Louis court of common pleas, against the defendant, as one of the owners of the steamboat *Meridian*, upon a contract of affreightment. The plaintiffs shipped upon said boat, at Pittsburg, one hundred kegs of nails, of the value of five hundred and thirty-nine dollars and thirty-seven cents, to be delivered in good order at the port of Galena, in the state of Illinois (the dangers of river navigation, fire, and unavoidable accidents excepted), to the plaintiffs or their assigns, they paying therefor at the rate of fifty cents per keg, with privilege of reshipping. The nails were reshipped at St. Louis, upon the steamboat *Illinois*, with the privilege of deviating as far as Jefferson barracks, which is about ten miles out of the direct course to Galena: the *Illinois* did deviate thus far, and after leaving Jefferson barracks, on her voyage to Galena, struck a rock and sunk, whereby the nails were lost. The defendant filed several pleas, in substance averring, that the said goods were shipped on the *Meridian*, with a privilege of reshipping the same at any time during the voyage; and that, during the said voyage, whilst

safely conveying such goods, she did reship the goods on board the Illinois, a good and stanch boat, then bound for, and about to proceed to Galena, to be safely carried and delivered according to said contract, etc. To all these pleas there was a demurrer. The demurrer was overruled by the court, and the defendant had judgment on the demurrer. The sufficiency of the pleas is therefore the only question presented by the records, and this depends upon the construction of the words, "with privilege of reshipping," contained in the bill of lading.

It is contended by the defendant in error, that the bill of lading containing the words "with privilege of reshipping," means that the carrier will convey the goods safely, as far as it may be convenient for him to go, and will then faithfully perform the duty of a forwarding merchant, in putting them on board a proper vessel for the port of destination. We do not take this view of the contract. The contract is an entire one, for carrying the goods safely from Pittsburg to Galena, and the consideration for the entire performance of the contract is fifty cents per keg. The privilege of reshipping, reserved in the bill of freight, enabled the defendant to carry the goods to the port of destination, either in his own boat or any other vessel, but in either event, did not discharge him from any liability not excepted in the contract. Had the words, "with privilege of reshipping," been omitted, the mere fact of reshipping the goods on another boat, unless in case of necessity, would have been a deviation, and made him responsible: Story on Bail., sec. 562; Ab. Sh., c. 8, secs. 1, 8. By the insertion of this clause, he is at liberty to tranship, or reship, on another boat, but his contract is not performed until the delivery of the goods at Galena. His compensation was for such delivery, and his liabilities should be commensurate thereto. The demurrer should have been sustained.

Judgment reversed, and cause remanded.

THE PRINCIPAL CASE IS CITED and approved in *Carr v. Steamboat Michigan*, 27 Mo. 197, where it was held, that the clause, "privilege of reshipping," in the bill of lading, released the carrier from all loss occurring on the boat to which the goods are reshipped, from which it would have released him if occurring upon his own boat; it held, that such a clause would not confer the right to store the goods temporarily on a wharf-boat at the point of reshipment; nor, under such a clause, would it be permitted to show that the "usual and customary mode of reshipping was to place the cargo on wharf-boats," etc.

OFFUTT v. JOHN, A MULATTO.

[8 MISSOURI, 120.]

JUDGMENT, GIVEN IN EVIDENCE under the general issue, is as conclusive as though specially pleaded in bar.

THE facts appear in the opinion.

Edwards, for the appellant.

Dunn, for the appellee.

By Court, NAPTON, J. This was an action brought by the appellee to establish his freedom, under the provisions of our statute regulating the mode of proceeding in such cases. The defendant pleaded the general issue, and offered in evidence the record of a suit for freedom, in the circuit court of Logan county, Kentucky, between the appellee and one Eli Offutt, from which it appeared that a verdict and judgment was had against the appellee. The appellant purchased the appellee from said Eli Offutt. The court instructed the jury, that this was persuasive evidence of the facts therein, but not conclusive; and that the defendant having elected to submit his cause to the jury, under the general issue, the jury were therefore to give their verdict upon the whole evidence; and they were not to try whether the plaintiff was estopped from trying the question, but whether the defendant was guilty of the wrongful act imputed to him. There was much other testimony in the case; and several questions raised in relation thereto, and discussed by the counsel; but as we think the instruction given, as above set forth, disposes of the whole case, it becomes unnecessary to investigate the other points in the case. The verdict and judgment were for the plaintiff in the circuit court.

No principle of law is better settled than that a judgment of a court of competent jurisdiction is binding upon the parties to that judgment, and their privies, so long as it remains unreversed. It is expedient to the peace of society, that there should be an end to litigation, and this would not be, if parties were at liberty to have as many controversies about the same subject-matter as their interest or passions might dictate. Hence it is a received maxim, *nemo bis vexari pro eadem causa*. The general principles determining the force and effect of judgments are summarily stated in the celebrated case of *The Duchess of Kingston*, 1 Ph. Ev. 321. "From the variety of cases," says Chief Justice De Grey, "relative to judgments being given in evidence in civil suits, these two deductions seem to follow:

First, that the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter coming incidentally in question in another court, between the same parties, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

This doctrine is, in substance, adopted by the court of errors in New York, as in the case of *Jackson ex dem. Genet v. Wood*, 3 Wend. 27, 28; *Id.* 5; a leading case on the subject in that state. The court there held, first, that the judgment of a court of concurrent jurisdiction, or one in the same court, directly on the point, is as a plea, a bar, and as evidence in certain cases, conclusive between the same parties, upon the same matter directly in question, in another court or suit; but is no evidence of a matter which was collaterally in question, nor of matter incidentally cognizable, or to be inferred only by argument or construction from the judgment; and, second, that if it does not appear, from the record, that the verdict or judgment in the former suit were directly upon the point or matters which are again attempted to be litigated in the second action, the fact may be shown *aliunde*, provided the pleadings, in the first suit, were such as to justify the evidence of those matters, and that it also appeared, that when proved, the verdict or judgment must necessarily have involved their consideration and determination by the jury. The same principle is laid down in the case of *Lawrence v. Hunt*, 10 Id. 80 [25 Am. Dec. 539].

Notwithstanding this principle, which has thus authoritatively been established, and in no case expressly dissented from, a distinction has been taken, both in England and several of the United States, between cases wherein the verdict and judgment have been pleaded as a bar, and those in which they have been offered in evidence. In the latter class of cases it has been held, that the verdict is not conclusive, but that the jury may find according to the fact in evidence, without being bound by such former verdict and judgment. A succinct review of the cases on this point is made by Judge Cowen, in his valuable notes to Phillips' Treatise on Evidence, vol. 3. p. —.

It is unnecessary to examine these cases at large, for they are numerous and conflicting; but as the question has been heretofore only incidentally determined by this court, we desire to base our opinion both upon authority and reason, and therefore recur to some of the leading cases.

It will be observed, upon an examination of these cases, that much of the diversity of opinion among the judges may be traced to a disposition to confound judgments with estoppels, and to set up a new and undefined distinction between verdicts and judgments. "An estoppel," says Blackstone, "is a special plea in bar; which happens where a man has done some act, or executed some deed, which estops or precludes him from averring anything to the contrary." Estoppels are either matter of record, as an admission in pleading, or by deed, as a bond, the consideration of which can not be inquired into at law; or by *parol*, as entry and acceptance of an estate, or an acceptance of rent: 2 Tuck. Com. 258. From this definition, and these instances of estoppels, it is not to be wondered at that they are viewed in law as odious defenses, inasmuch as they frequently preclude a party from showing the truth. It is equally clear that, regarding them in this light, there is but little analogy between them and judgments. The former is the act of the party, the latter is the solemn sentence of the law pronounced by a court of competent jurisdiction. The former constitute a constraint upon a personal privilege; the latter concern not only the parties to that judgment, but upon their inviolability depend the peace and security of the community. In determining the effect of judgments, therefore, there is an obvious impropriety in regarding them merely as estoppels, and applying to them the principle governing the latter class of defenses.

Some confusion is also created in the elementary books, by generally treating of verdicts and judgments as inseparable concomitants, and occasionally attempting a distinction between them, as though a verdict upon which no judgment was pronounced was, of itself, entitled to any weight. In Ph. Ev. 223, it is said, "that where a judgment is pleaded, it is proposed as something decisive and conclusive, as *res judicata*. When a verdict is offered in evidence, it is proposed on the same footing as the rest of the evidence in a cause, only as a medium of proof, and the credit due to it must depend upon the nature and circumstances of the particular case. It is merely the opinion of a former jury upon the facts there laid before them, and with reference to the strength or weakness of the proof on each side."

For this opinion, no authority is cited. If the author, in speaking of the weight to which verdicts are entitled, as contradistinguished from judgments, alludes to that class of cases in which verdicts are admitted as testimony, or a species of hearsay evidence, on questions of pedigree, prescription, or custom, there may be some truth in the position he assumes; but it is not perceived upon what authority, or principle, a distinction is taken between verdicts and judgments, where they are upon the same point, and between the same parties, and when there can be no verdict admissible at all, unless that verdict has been ripened into a judgment. The same opinion has been adopted by the supreme court of Connecticut, a court which has, in several cases, sustained the position assumed by the circuit court of Ray county, in its instructions to the jury on the case now before the court. In the case of *Betts v. Starr*, 5 Conn. 550 [18 Am. Dec. 94], the court held the judgment, which was offered in evidence under the general issue, a bar, and conclusive; but the judge who delivered the opinion of the court said: "Though verdicts must generally, if not always, be specially pleaded, when they are relied on as conclusive; yet a judgment of a court, when properly given in evidence, is as conclusive as though specially pleaded." This position appears to rest upon the authority of Buller's *Nisi Prius*, 232, who refers to the case of *Clarges and Sherwin*, Cas. K. B. 343; S. C., 12 Mod. 343, in which the only question was upon the legitimacy of the Duke of Albemarle, and the court would not suffer a former verdict between other parties, concerning other land depending on the same question and title, to be read in evidence. It is clear, that the verdict is entirely inadmissible, unless the record of the judgment founded upon it be produced; for if it happen that the judgment has been arrested, or a new trial granted, the verdict is no evidence: Bull. N. P. 234; *Mahoney v. Ashton*, 4 Har. & M. 322; *French v. O'Neale*, 2 Id. 402. The whole amount of the doctrine, then, is, that when a verdict is offered in evidence, the whole record must be produced; and though the judgment is, in such cases, conclusive, the verdict is not held to be equally so, either because it embraces a finding of special facts which do not appear in the judgment, and therefore may be regarded merely as the opinion of twelve men, and as such, persuasive or pregnant evidence, as it is termed, of the truth of such facts to another jury, when they again come into controversy between the same parties, or, because there is nothing on the face of the record, either in the verdict or judgment, showing the points

actually decided, and therefore evidence *aliunde* must be introduced, to show what was determined; and such evidence, being by parol, must be governed by the same rules which regulate every other kind of parol testimony. If the former be the basis of the doctrine, it is confined to special verdicts; and if the latter be the foundation of this distinction between verdicts and judgments, then it is obvious that it can make no difference whether the record be pleaded specially, or offered in evidence. In either event, it can not of itself be conclusive.

Goddard's Case, 2 Co. 5, is one of the earliest cases relied on to sustain this distinction between the effect of judgments, when offered in evidence, and when specially pleaded. That was an action on a bond given to a deceased intestate; and the defendant pleaded, that the intestate died before the date of the bond, and so concluded that the writing was not his deed, on which issue was taken; and it was held, that the jury were not estopped from finding the bond was executed nine months before it bore date, and in the life-time of the intestate: Bull. N. P. 298. There seems to be nothing in this case to warrant the conclusions which have been drawn from it. In *Trevivan v. Lawrence*, 1 Salk. 276, it was held, that a party, by neglecting to plead an estoppel when he may, thereby consents to waive the same, and submits the whole controversy to the jury, on its merits. Upon this case rest the celebrated cases of *Vooght v. Winch*, 2 Barn. & Ald. 662, and *Outram v. Morewood*, 3 East, 346; and yet it is clear, that the principle settled in that case could have no application to cases where special pleading was not required. It can not apply to actions of *assumpsit*, and other actions, where matters in bar may be given in evidence under the general issue; for in such actions there is no obligation on a party to plead, and the failure to plead specially can not, by being regarded as neglect, be construed into a waiver by consent. In the case of *Vooght v. Winch*, it was well remarked by Judge Cowen, 3 Ph. Ev. —, the judgment offered in evidence would not have been conclusive had it been specially pleaded, and, therefore, all that the court says in relation to the mode of its introduction was outside of the case.

In the United States, the decisions on this point have not been uniform. In Pennsylvania, the courts have confined the principle held in *Outram v. Morewood* to cases where special pleading is required, and holding, that in actions of *assumpsit* the record of the former recovery is conclusive, "binding the parties, the court, and the jury:" *Kilheffer v. Herr*, 17 Serg. &

R. 319 [17 Am. Dec. 658]; *Cist v. Zeigler*, 16 Id. 282 [16 Am. Dec. 573]; *Marsh v. Pier*, 4 Rawle, 273 [26 Am. Dec. 131]. In Massachusetts, the question has turned upon the principle of special pleading, and there is nothing in the decisions of the court of that state to sustain the broad doctrine assumed in the instructions of the circuit court. In *Howard v. Mitchell*, 14 Mass. 241, the defendant, in trespass, pleaded in abatement, that one H. was co-tenant with plaintiff, upon which issue was joined. At the trial, plaintiff claimed that the defendant was estopped from showing the truth of his plea, because of a former judgment, whereby the contrary was established; but the court held, that the plaintiff should have replied such judgment specially, and failing to do so, the defendant was not estopped. The same principle was decided in *Adams v. Barnes*, 17 Id. 365. In *Church v. Leavenworth*, 4 Day's Cas. in Err. 277, Judge Swift, of Connecticut, delivering the opinion of the court, adopts the doctrine of Lord Ellenborough, in *Outram v. Morewood*, that verdicts are never conclusive unless specially pleaded. The opinion of this eminent jurist is entitled to great respect; yet it is worthy of observation, that his opinion on this point seemed nowise necessary to the decision of the case; for it appeared, from his statement, that the same point was not in issue in the two cases, and on this ground alone the case could have been decided. Judge Baldwin, who dissented, lays down the law as decided in the *Duchess of Kingston's Case*.

In Virginia, the weight of authority is in opposition to the doctrine of *Outram v. Morewood*. The cases of *Shelton v. Barbour*, 2 Wash. 64, and *Preston v. Harvey*, 2 Hen. & M. 55, are decisive on this point; nor can it be considered as at all unsettled by the doctrine of Judge Carr, in *Cleaton v. Chambliss*, 6 Rand. 94. In that case the court held, that the cause of action was not the same, and therefore, whether pleaded in bar or given in evidence, was not conclusive. The case of *Young v. Black*, 7 Cranch, 566, was an action of *assumpsit*, and a former judgment, given in evidence under the general issue, was held by the court to be conclusive. The same point was determined in the case of the *United States v. Nourse*, 9 Pet. 8. The case of *McNight v. Taylor*, 1 Mo. 282, though the point was not expressly made, shows in what light this court has heretofore viewed this subject. That was an action of *assumpsit*; plea, *non assumpsit*: and under this issue, the defendant gave in evidence a judgment. The court held that the record of a former suit, being for the same cause of action, between the same par-

ties, and necessarily supported by the same proof, was a bar. The same doctrine was held in *Penrose v. Green*, Id. 774.

Such being the contrariety of the decisions on this point, it is evident, that there is no such preponderance of authority as to induce this court to decline adopting that doctrine which appears to be better supported by reason, sounder in principle, and safer in practice. It is difficult to assign any reason why the weight and value of testimony should depend on the mode in which it gets before the jury. If a judgment were to be regarded as a mere estoppel, we can perceive good reasons for saying that such estoppel, being a mere personal privilege, may be waived by the consent or negligence of the party. The judgments of courts must rest on different grounds. It is not merely for the convenience of the parties, but for the interest and peace of society, that they are regarded as binding and conclusive. In the present case, the action in the Logan circuit court was between the assignee of the present defendant, and the plaintiff: and the jury, it appears by the record, found the fact which is now in issue between these parties; and the judgment of the court was, that John, the plaintiff, was a slave.

The instruction of the court below, which allowed the jury to disregard this judgment, was, in our opinion, erroneous. The judgment is reversed, and the cause remanded, to be proceeded with in conformity with this opinion.

PRIOR JUDGMENT IS GENERALLY CONCLUSIVE, whether given in evidence under the general issue or specially pleaded in bar: *Burt v. Sternburgh*, 15 Am. Dec. 402, and note; also *Betts v. Starr*, 13 Id. 94, and note; *Gardner v. Buckbee*, 15 Id. 256; *Town v. Nims*, 20 Id. 578; *Lawrence v. Hunt*, 25 Id. 539; *Wright v. Butler*, 21 Id. 323, and note 327; *Marsh v. Pier*, 26 Id. 131; but that it is waived, if the party relying upon the judgment fails to specially plead it in actions where judgments are required to be specially pleaded: See *Killeffer v. Herr*, 17 Id. 658; *Wood v. Jackson*, 22 Id. 603, and note 621.

STONE v. GRAVES.

[8 MISSOURI, 148.]

JUDICIAL OFFICER IS NOT LIABLE IN A CIVIL ACTION, when acting judicially and within the sphere of his jurisdiction, although he may act from impure and corrupt motives.

JUDICIAL OFFICER IS LIABLE, WHEN ACTING MINISTERIALLY, for error and misconduct, in like manner with other ministerial officers.

ALTERNATE PLEADING IN THE SAME COUNT, as charging a loss or destruction, is bad: each should constitute a separate count.

THE opinion states the facts.

Slack, for the appellants.

Stringfellow, for the appellee.

By Court, SCOTT, J. The appellants, plaintiffs, brought an action on the case against the appellee, defendant, a justice of the peace, for misconduct in office. The declaration contained three counts: the first and third charged that the defendant, being a justice of the peace, did corruptly and willfully refuse to enter a judgment in a suit pending before him, in which the appellants were plaintiffs, and one Pettigrew was defendant; the second count charged the appellee with neglect, by which the note on which suit was brought was lost or destroyed. To this declaration there was a special demurrer, which was sustained by the court, and a judgment rendered for the appellee, defendant. From this judgment the appellants, plaintiffs, appealed to this court.

This case presents the question, whether a justice of the peace, when acting judicially and within the sphere of his jurisdiction, is liable to an action for any error he may commit, although he may act from impure and corrupt motives? It is not pretended, that for malice, corruption, partiality, or any misdemeanor in office, a justice of the peace, when acting judicially, is exempt from punishment, but the question is, whether he is liable to a civil action by the party aggrieved? In the case of *Lansing v. Yates*, 5 Johns. 291, a case of intense interest, and which was profoundly investigated both by the bench and the bar, Judge Kent remarks: "The doctrine which holds a judge exempt from a civil suit for any act done or omitted to be done by him sitting as a judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of the government." Sergeant Hawkins maintains, b. 1, c. 7, that the law has freed the judges of all courts of records from all prosecutions whatsoever, except in the parliament, for anything done by them openly in such courts. Lord Holt, in *Groenvelt v. Burwell*, is equally explicit, that a judge shall not be questioned at the suit of the parties: 1 Ld. Raym. 468. The maintenance of this principle is essential to the due administration of justice. If, for every erroneous judgment in the discharge of his duties, a justice was held responsible in damages, hard, indeed, would be his condition. Law is a moral, and

nota mathematical science. What is the law in many cases is a mere matter of opinion, and about which the most upright and enlightened judges will differ. The rules and principles which govern, in the exercise of judicial power, are not in all cases plain; they are often complicated, and appear in different views to different men. Few would accept the office of judge, if they were to answer with their estates for every error in judgment, or if they were to be harassed with litigation by every unfortunate or disappointed suitor.

In *Mostyn v. Fabrigas*, Cowp. 161, Lord Mansfield says, "That, by the law of England, if an action is brought against a judge of a court of record for any act done by him in his judicial capacity, he may plead that he did it as a judge of a court of record, and that will be a complete justification." This principle has been invariably acknowledged, and has received the sanction of the courts of many of our sister states. In the case of *Phelps v. Sill*, in the supreme court of Connecticut, 1 Day's Cas. in Err. 815, a suit was instituted against a judge of probate for neglecting to take security from a guardian, and the court held the action did not lie. It was held to be a settled principle, that a judge is not to be questioned in a civil suit for doing, or for neglecting or refusing to do a particular official act in the exercise of judicial powers. The supreme court of South Carolina, in the case of *Lining v. Bentham*, 2 Bay, 1, held unanimously, that a justice of the peace was not liable to an action for what he did in his judicial capacity, though he was subject to indictment if he acted oppressively. In *Brodie v. Rutledge*, Id. 69, it was declared to be a well-ascertained principle of law, that no action could be brought against a judge for any judgment rendered by him in his judicial character, though liable to impeachment.

Although a judge, or justice of the peace, when acting judicially and within the sphere of his jurisdiction, is not responsible, in a civil suit, for a mere error of judgment, yet from the *dicta* of judges in some cases, and from not discriminating between judicial and ministerial acts, an opinion is entertained by some, that although a judge, or justice of the peace, acts judicially, and within the sphere of his jurisdiction, yet if he suffers his judgment to be swayed by malice or corruption, he is responsible, in damages, to the party aggrieved. The whole tenor of the opinion of the court in the case of *Lansing v. Yates*, before cited, in which the whole learning on this question is exhausted, repels this idea. In the case of *Cunningham v. Bucklee*, 8 Cow. 178 [18 Am. Dec. 432], Chief Justice Savage, in de-

delivering the opinion of the court, says: "No case has been produced showing that a judge of a court of record has ever been held responsible in a civil action, even for misconduct in office. Holt says, that they have been laid by the heels and compelled to ask the king's pardon, by which I understand they were removed from office. Indeed the same reasons operate in some measure to protect them against all suits, whether arising from their errors or their crimes. If an action were to lie at all, it would be easy for every person dissatisfied with the decision of the court (and one party is always dissatisfied), to allege corruption, and thus harass the judges, whose time and property, if they happen to have any, would be wasted in defending suits, which, if not founded in, might be supported by, corruption. Hard, indeed, would be the condition of a judge, if he were thus exposed to never-ending litigation. Chitty, in his treatise on pleading, understands the authorities in the same way, and relies on some referred to in this opinion, in support of the principle, that an action can not be supported against a judge, nor a justice of the peace, acting judicially, and who has not exceeded his jurisdiction, however erroneous his decision, or malicious his motive:" 69.

The case of *Gregory v. Brown*, 4 Bibb, 28 [7 Am. Dec. 731], is often cited, in support of a doctrine contrary to the foregoing. But upon an examination of that case it will be found, that the point did not arise. That was not an action for acting maliciously or corruptly; the conduct of the justice was not imputed to corrupt and impure motives, and there was a judgment for the defendant: the court, in delivering its opinion, said: "An action will not lie against a justice of the peace for a judicial act within his jurisdiction, unless he has acted from impure and corrupt motives." So this was no point decided, but merely a *dictum* uttered in delivering an opinion. This principle is not to be understood as extending to ministerial acts required to be performed by an officer whose functions may be sometimes judicial. Some of the duties of a justice are judicial, and some ministerial; and when he acts ministerially, or is required to do a ministerial act, for error and misconduct he is responsible in like manner, and to the same extent, as all other ministerial officers. The distinction is between judicial and ministerial acts. The rendering a judgment is purely a judicial act. The justice must determine whether the record and proceedings before him will authorize such measure, and for this exercise of his judgment he is not responsible in a civil action. The de-

murrer to the first and third counts was therefore properly sustained.

The charge in the second count is, that the defendant neglectfully and carelessly lost or destroyed the note left with him for suit. This mode of declaring is not allowable. In the same count a party can not be charged in the alternative with doing an act, or another and a different act; he should have employed two counts to make the several charges.

Judgment affirmed.

LIABILITY OF JUDICIAL OFFICERS FOR MISCONDUCT: For a full discussion, see note to *Cunningham v. Buckley*, 18 Am. Dec. 440, and note to *Yates v. Lansing*, 6 Id. 303. See also *Reid v. Hood*, 10 Id. 582; *State v. Flinn*, 23 Id. 330; *Tompkins v. Sands*, 24 Id. 46, and note.

THE PRINCIPAL CASE IS CITED and approved in *Pike v. Megoun*, 44 Mo. 496, and *Lennox v. Grant*, 8 Mo. 255, to show that an action does not lie against persons acting judicially in a matter within the scope of their jurisdiction, however erroneous their judgment or corrupt their motives; to the same effect is *Briggs v. Wardwell*, 10 Mass. 358; *Doswell v. Impey*, 1 Barn. & Cress. 169; *Phelps v. Sill*, 1 Day, 315; *Wertheimer v. Howard*, 30 Mo. 420.

MEDLIN v. PLATTE COUNTY.

[8 MISSOURI, 235.]

ALTERATION OF AN INSTRUMENT BY A STRANGER to it, is a mere mutilation of the instrument, not changing its legal operation so long as the original writing remains legible; and if illegible, compelling a resort to secondary evidence of its contents.

DEBT ON A SPECIALTY MAY BE JOINED with debt on a simple contract.

TESTIMONY OF A JUDGE THAT THE COURT VERBALLY ORDERED an act to be done, is inadmissible; the records of the court are the evidence of its official acts.

The facts are stated in the opinion.

Jones and Leonard, for the appellant.

By Court, TOMPKINS, J. The state of Missouri sued Hall Medlin and others in debt. The action was brought on an instrument of writing by which Medlin and two others promised to pay to the state five hundred dollars. There were several counts in the declaration, in some of which the plaintiff declared on the instrument of writing sued on, as a sealed instrument, and in others as an unsealed writing. The two other co-defendants being otherwise disposed of, a verdict and judgment went against Hall Medlin in said count, and to reverse it he appealed to this court.

The bill of exceptions shows, that the instrument of writing

sued on was given to the county of Platte for so much money borrowed from it by the defendants, of whom John Allen was principal, and Stephen Johnson and Hall Medlin, the present defendant, were securities, and that Johnson's name was erased. James H. Johnson, the first witness introduced by the plaintiff below, states, that by request he wrote the instrument of writing sued on, and saw said Allen and Johnson sign it, and that immediately after they went to the court-house, the court being then in session; that he was treasurer of the county; that a day or two afterwards the note was handed to him by the deputy clerk, and that about a week after he gave the clerk of the county court a receipt for said note or writing. He further states, that his recollection is not distinct, but he thinks the name of Johnson was erased from said note at the time he received it. The deputy clerk, who handed the writing to the treasurer, thought that Johnson's name was not erased when he passed said writing to James H. Johnson, the treasurer; and the treasurer, succeeding to Johnson, stated that he never heard of the erasure of Johnson's name till he parted with the possession, and that he did not believe it was erased before he parted with it. No order was found on the records of the county court to authorize either the loan to Allen, on the security of Johnson and Medlin, or the erasure of the name of Stephen Johnson.

John B. Collier, a witness of the defendant, stated, that when said instrument of writing was accepted by the county court of Platte county, he was a member of that court; that when the writing was handed to the court the names of the three makers were signed and affixed thereto; that he did not recollect how long, after its reception by the court, it was until the name of Johnson was erased; that no order was made accepting said Medlin and Johnson as securities for Allen, but they were received verbally by the court. The defendant then offered to prove, by this witness, that the said county court, whilst in session, and in open court, agreed verbally that the name of said Johnson might be erased from said note, and that it was erased accordingly by the authority of said court, without the knowledge or consent of Medlin. This testimony was rejected by the circuit court, and the decision of the court was excepted to. The evidence being closed, the circuit court, on the motion of the plaintiff, instructed the jury, that the erasure of the name of Johnson could not release Medlin unless it were made by the order of the county court while in session. This is the substantial part of four instructions demanded by the plaintiff.

The defendant asked the four following instructions: 1. That if the name of the said Johnson has been erased from said writing since the execution and delivery thereof, it is incumbent on the plaintiff to prove that it was done by accident or mistake, or by the consent of Medlin, and that in the absence of such proof they must find for Medlin. 2. That if the county court of Platte county, whilst in session, gave leave to said Johnson, or to any other person, to erase the name of said Johnson from said writing, and that it was in pursuance of such leave erased therefrom, and that it was done without the consent of Hall Medlin, then the jury will find for said Medlin; and that it is not necessary that the order of the court, in order to be binding on the plaintiff, should have been entered on the record book of that court, and that the same may, at any subsequent term of said court, be entered, *nunc pro tunc*. 3. That if the county court of Platte county, whilst in session, ordered Johnson's name to be erased from the note, and the erasure was made in pursuance of such order, and without Medlin's consent, then they will find for him, said Medlin, whether that order was entered of record or not, and that it is the duty of the plaintiff to show that the alteration was not made by the plaintiff, or by any of the agents of said plaintiff. 4. That if the jury believe the name of said Johnson has been erased from said note, since its execution and delivery to the plaintiff, and that it was done either by the plaintiff, or by any other person than Medlin, and without his consent, then the note as to him is void, whether the erasure was made with or without the consent of the plaintiff. These instructions were refused, and exceptions were taken to the decision of the court.

A new trial was moved for, for several reasons, which may be resolved into one—that the court refused to give the instructions. The defendant also moved in arrest of judgment. Even had the defendant stood on his demurrer to the declarations (which he withdrew), there could have been no reason to reverse the judgment for a misjoinder. Chitty, in the first volume of his pleading, says, that debt on a bond, or other specialty, may be joined in the same action with debt on simple contract.

With regard to the instructions charged to have been erroneously given by the circuit court, it may be observed, that, like other bodies corporate, and also like persons, it will be presumed to accept whatever is for its interest to receive, until it in some way signifies its dissent; but it will be presumed to part with none of its rights till it has expressed its will on its records: the evidence then offered, *i. e.*, the testimony of one of the judges,

to prove that the several members of that court, while in session, assented to the erasure of Johnson's name, etc., was inadmissible. The judges of the county court could express their assent to such an act on their record only; and it will then only be in season for this court to decide whether such an entry of assent can be made *nunc pro tunc*, when such an entry shall have been made by the county court; but no such entry being now made, this court must proceed as if it had never heard anything of the assent of the judges in open court. The only question remaining, then, for this court to decide, is, whether the instrument here sued on became void in consequence of the erasure of Johnson's name.

In Greenleaf on Evidence it is said, that the early decisions establish the general proposition, that written instruments which are altered, in the legal sense of that term, are thereby made void. The grounds of this doctrine are two-fold. The first is, that of public policy, to prevent fraud, by not permitting a man to take the chance of committing a fraud, without running any risk of losing by the event when it is detected. The other is, to insure the identity of the instrument; and prevent the substitution of another, without the privity of the party concerned. A distinction, however, is to be observed, between the alteration and spoliation of an instrument, as to the legal consequences. The term, alteration, is, at this day, usually applied to the act of the party entitled under the deed, or instrument, and imports some fraud or improper design on his part to change the effect. But the act of a stranger, without the participation of the party interested, is a mere spoliation or mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible, and, if it be a deed, any trace of the seal remains. If, by the unlawful act of a stranger, the deed is mutilated or defaced, so that its identity is gone, the law regards the act, so far as the rights of the parties to the instrument are concerned, merely as the accidental destruction of primary evidence, compelling a resort to that which is secondary. Thus, if it be a deed, and the party would plead it, he can not plead it with a profert, but the want of profert must be excused by an allegation that the deed, meaning its legal identity as a deed, has been accidentally, and without the fault of the party, destroyed; and whether it be a deed, or any other instrument, its original tenor must be substantially shown, and the alteration or mutilation accounted for: See pp. 600, 601.

The old doctrine, that every material alteration of a deed,

even by a stranger, and without the privity of either party, avoided the deed, was strongly condemned by Story, J., in *United States v. Spalding*, 2 Mason, 478, as repugnant to common sense and justice; as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of heaven; and which ought to have the support of unbroken authority, before a court of law was bound to surrender its authority to what deserved no better name than a technical quibble: See note to the same page of Greenleaf. Under this law, as declared in the authority cited (and there are many others cited), the county can not be called on to prove the erasure of Johnson's name. The county court, the representative of the county, has entered up no order to that effect; it has made no order even commanding its agent, the treasurer, to do so; the deputy clerk, who delivered the writing sued on to the treasury, says, he does not believe that the erasure was made when he delivered the writing to the treasurer, Johnson, and although Johnson says he believes the name was erased when he received the instrument from the deputy clerk, yet the treasurer who succeeded to Johnson, testifies that the name was not erased, as he believes, when the instrument of writing passed from his hands. More satisfactory evidence could not be required from a person; but in this case the plaintiff is a body corporate, speaking by its record only, and none of its agents have authority to make such an erasure; two of those agents testify that the writing passed from them undefaced.

But if those agents ever had defaced this instrument of writing, their act could have been no other than the act of a stranger, they having no authority to do the act, and no interest in the money due by the writing. The note was then admissible evidence, and the judgment must be affirmed.

EFFECT OF ALTERATION OF AN INSTRUMENT: See note to *Lewis v. Pagn*, 18 Am. Dec. 431, and cases in this series there cited.

THE PRINCIPAL CASE IS CITED and approved in *Dennison v. County of St. Louis*, 33 Mo. 171, and *Milan v. Pemberton*, 12 Id. 600, that the acts of a court of record are known by its records alone, and can not be established by parol testimony.

STATE v. PRATTE ET AL.

[8 MISSOURI, 288.]

ACTION UPON AN ADMINISTRATOR'S BOND IS BARRED IN MISSOURI by a lapse of ten years after the cause of action accrued.

STATUTE OF LIMITATIONS WILL RUN AGAINST THE STATE, where a bond is taken in its name, but for the use of an individual.

THE facts are stated in the opinion.

Scott and Zeigler, for the plaintiff.

Cole, for the defendants.

By Court, TOMPKINS, J. This is an action brought by the governor, for the use of Pierre Menard, against Joseph Pratte and Auguste St. Genome, on an administration bond executed by said Pratte and St. Genome, as securities, and Marie Therese St. Genome, as principal, on the tenth day of May, in the year 1824. The declaration shows that the administratrix was dead, but does not show when she died. The defendants pleaded: 1. that the cause of action did not accrue within seven years. 2. That it did not accrue within ten years. The plaintiff demurred to these pleas, and the circuit court sustained the demurrer to the first, and overruled that to the second plea.

If an executor or administrator die before the final settlement of the estate, the law contemplates, in case of there being but one, that letters of administration will be again granted to such persons as they would have been granted to if the original letters had not been obtained, etc.: Thirty-third section of the first article of the act respecting executors and administrators. And by the thirty-sixth section of the same act, an executor or administrator has only seven years to sue the securities of the deceased executor or administrator: Pp. 44, 45 of the Digest of 1835. This was the law when these letters were granted, and continues to be so.

If the law allows but seven years to the succeeding administrator to sue the original and his securities, or the security alone, if he be dead, it can not be reasonably supposed that no lapse of time shall bar the right of creditors to sue the securities, when their principal has died in the full enjoyment of the administration of the rights and credits of the intestate. But it appears on the record, that the demand of this plaintiff stands proved on the record of the county court of St. Genevieve county. This is, without doubt, the case, in most instances, when an administrator is removed for neglect of duty; and if

it appear that he has failed to pay accounts that have been long allowed, and has not accounted for his neglect, it is the best possible reason why he should be removed. And if the law require his successor to proceed against such removed administrator and his securities within seven years, it can not reasonably be supposed that where the creditors have neglected to cause a successor to be appointed, that they should be barred from their right of action by no lapse of time. There is much better reason for limiting the right of the creditor to sue a security of a deceased administrator on the official bond, than for limiting the right of a successor to sue his predecessor and the securities. The deceased administratrix may have paid the demand, which this plaintiff, in this action, has established in the county court of St. Genevieve county; and they may not be able to prove what she could easily have proved had she been living. She may have paid the demand in her life-time, and have omitted to get a credit for such payment from the county court. And if the law will not, after a lapse of seven years, admit a demand, by the successor, against a preceding administrator removed for neglect of duty, it can not be an unreasonable construction of our statute of limitations to say, that the creditors of the intestate shall be precluded, after a lapse of ten years, from proceeding against the securities of this deceased administratrix.

At what time this right of action may have accrued, it is no part of the duty of this court to inquire: it is sufficient to say, that the demurrer admits that it did not accrue within ten years. It must not be supposed that this court means to say that a suit can not be commenced on an administrator's bond more than ten years after its date. The right of action may not accrue for years after the execution of the bond; for instance, it might possibly occur that the administratrix could not, in her life-time, even obtain money, or, for anything appearing on the record, she may have died more than ten years before the commencement of this suit, and the right of action may have accrued in her life-time.

It was objected, that this bond is like one given to the state, and that the statute of limitations does not run against the state. The principle which prevents the statute of limitations from running against the state, does not apply to official bonds given to the state for the use of individuals, who may be aggrieved by the misconduct of those officers. In such cases, although the bond is nominally given to the state for the sake

of convenience, yet, in reality, every cause of action on the bond, besides those the state may herself have, is a private concern, and not at all within the principle which, from considerations of policy, forbids the state to be barred by the statute of limitations from suing, in cases in which she herself, in her corporate capacity, may be interested. *Montgomery v. Hernandez*, 12 Wheat. 134, shows that the statute of limitations on official bonds, given to the United States for the use of individuals, runs not from the giving of the bond, but from the breach of the condition; and although the condition of a marshal's bond is broken by his neglect to bring money into court directed to be brought in, or to pay it over to the party, yet, if the proceedings be suspended by appeal, so that the party injured has no right to demand the money, or to sue for the recovery of it, his right of action has not accrued so as to bar it, if not commenced within six years. This will illustrate what is said about the right of action accruing on an administrator's bond. The demurrer to the second plea was rightly sustained, and the judgment of the circuit court must be affirmed.

The cause will be remanded, and the plaintiff have leave to withdraw his demurrer, if he wish.

THE PRINCIPAL CASE IS CITED and approved in *State v. Blackwell*, 20 Mo. 99, to show that the statute of limitations runs, against the distributee of an estate and in favor of the administrator, from the date of the final settlement and order of distribution; also to the same effect in *State v. St. Gemme*, 23 Id. 344; S. C., 31 Id. 230; also cited in *Finney v. The State*, 9 Id. 227, that a plea of the statute of limitations should set forth that the cause of action had accrued more, etc., and that a plea, of within three years after granting letters of administration, etc., was bad.

GLASGOW v. PRATTE.

[8 MISSOURI, 336.]

WAIVER OF DEMAND AND NOTICE BY THE INDORSER to the maker of a note, uncommunicated to the holder, is not a waiver by the indorser to the latter.

DEMAND OF NOTE PAYABLE IN A CERTAIN PLACE must be made at the designated place to bind the indorser.

NOTICE OF NON-PAYMENT MAY BE EITHER VERBAL OR IN WRITING, and may be given by any party to the bill or note.

THE facts are stated in the opinion.

Darby, for the plaintiff in error.

Bogy and Hunton, for the defendant in error.

By Court, SCOTT, J. This was an action of *assumpsit*, on a promissory note made by Grimsley and Young, payable to Bernard Pratte, at the office of the Mutual Insurance Company of St. Louis, and by him indorsed to William Glasgow. The action was by the indorsee, Glasgow, against the indorser, Pratte. On the trial, it was proved by Young, one of the makers of the note, that on the day it became due, he went to the plaintiff and informed him, that he would not be able to pay more than half the amount of the note at that time, and asked for a week longer to pay the balance. The plaintiff said he had no objection to the indulgence asked, if the indorser would consent to it. Witness afterwards saw the indorser, Pratte, on the same day, in the office of L. A. Benoist & Co., where the note was placed for collection; witness informed the indorser of the previous conversation with the plaintiff, and the defendant responded, that he had no objection to giving the makers a week longer to pay the other half of the note. Nothing was said about any further notice, one way or the other. Witness paid the plaintiff one half the amount due on said note, on the day it became due, and the said note was not afterwards presented for payment, or protest for non-payment, nor was there any further notice given of the dishonor of the said note. Witness also testified that the makers of said note had paid other and larger debts subsequent to the time when the balance on this note became due. The court, sitting as a jury, gave verdict and judgment for the defendant.

This cause was submitted to the court sitting as a jury, and as the court was not requested to declare the law on the facts, we are at a loss to determine the specific objection to the verdict and judgment. Had this cause been submitted to a jury, and no instructions asked by either party, and no law declared to the jury by the court, this court would have been very loath to interfere. We do not well see what solid distinction, in this respect, there is between the two modes of trial. In either case, this court can not well determine whether the objection is to the finding, as being against evidence, or whether it is to the application of the law to the facts. It would certainly have been better had it been understood, that when the parties waive a trial by jury, they waive also its incident—the right to apply for a new trial.

Whatever doubt may have been entertained on the subject, it seems now to be settled, that notice of the dishonor of a bill or note, given by any party to the bill, is sufficient. It is not essential, as has been sometimes holden, that the party suing

should give the notice. It is sufficient if any party to the instrument give it: *Stafford v. Yates*, 18 Johns. 327. And notice of non-payment may be either verbal or in writing: *Cuyler v. Stevens*, 4 Wend. 566. The case of *Forster v. Jurdison*, 16 East, 105, is an authority to show that notice of the non-payment of the note on which this suit was brought, at the end of the week for which indulgence was granted, was not necessary to fix the indorser, the first notice being sufficient for that purpose.

Admitting the notice given by Young to Pratte, of the non-payment of the note, was sufficient, and that no notice of the non-payment at the end of the week was necessary, yet was not a presentment for payment, at the place of payment named on it, necessary to bind the indorser? In the case of the *Bank of the United States v. Smith*, 11 Wheat. 171, the supreme court of the United States says, that, as against the maker or acceptor of a bill or note payable at a particular place, no averment or proof of demand of payment at the place designated, would be necessary. But when recourse is had to the indorser of a note or bill, different considerations arise. He is not the original debtor, but only surety. His undertaking is not general, like that of a maker, but conditional, that, if upon due diligence having been used against the maker, payment is not received, then the indorser becomes liable to pay. This due diligence is a condition precedent, and an indispensable part of the plaintiff's title and right of recovery against the indorser. And when, in the body of a note, a place of payment is designated, the indorser has a right to presume that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for payment at such place. In *Backus v. Shipherd*, 11 Wend. 629, a stipulation by the indorser of the note, to waive notice of demand of payment, does not dispense with the demand itself. So, in the case of *Cruger v. Armstrong*, 3 Johns. Cas. 5 [2 Am. Dec. 126], it was held, that if the drawer has no funds in the hands of the drawee, it is no excuse for not demanding payment, though it may excuse the want of notice to the drawer. A note may be paid at the place where payable, for the honor of the maker.

In the case of *Agan v. McManus*, 11 Johns. 186, it was held, that the doctrine as to the waiver of notice of the dishonor of bills of exchange does not apply to promissory notes. In the case of *Gregory v. Allen*, 1 Mart. & Y. 74, it was held, that in order to show a waiver of demand and notice by an indorser,

clear and unequivocal evidence is required of such waiver. In the case of the *Union Bank v. Magruder*, 7 Pet. 287, whether certain facts, in reference to an alleged notice to the indorser and demand of payment of a promissory note by the drawer, amounted to a waiver of the objection to the want of demand and notice, is a question of fact, and not matter of law, for the consideration of the jury.

There is no evidence that Young, the witness and one of the makers of the note, was an agent for Glasgow, and it does not appear that the witness ever communicated to Glasgow the fact, that Pratte consented to the indulgence asked by Young. If Glasgow was wholly unapprised of Pratte's consent, it is hard to see with what propriety it can be said to be a waiver by Pratte of demand for payment, and the fact that he was not unwilling to the indulgence, if not communicated in an authorized manner to Glasgow, could no more be termed a waiver, than the mere existence of it in his breast, uncommunicated to any one. *De non apparentibus et non existentibus, eadem est ratio.* We can see no reason for disturbing the judgment of the court below.

Judgment affirmed.

THE PRINCIPAL CASE IS CITED in *Walker v. Bank of Missouri*, 8 Mo. 707, to the effect that notice of non-payment or non-acceptance must in general come from the holder of the bill or note, and should be given by some servant or agent, who will be competent to prove it. To the same effect is *Glascock v. Bank*, Id. 444.

DEMAND, NOTE PAYABLE AT PARTICULAR PLACE.—That the indorser of such a note is discharged if demand of payment is not made at the proper time and designated place, see *Smith v. McLean*, 7 Am. Dec. 693; *Sullivan v. Mitchell*, 6 Id. 546. Perhaps the majority of authorities is the other way: See citations to *Brittain v. Doylestown Bank*, 39 Id. 114.

NOTICE TO CHARGE INDORSER, HOW MUST BE GIVEN: See note to *Ransom v. Mack*, 38 Am. Dec. 607-616.

AM. DEC. VOL. XL—19

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

HENRY v. SARGHANT.

[13 NEW HAMPSHIRE, 321.]

ACTION FOR FALSE IMPRISONMENT IS IN ITS NATURE TRANSITORY, and the courts of this state have jurisdiction of such an action, brought to recover damages for an arrest under a warrant issued to enforce the collection of an illegal tax of another state.

LEGALITY OF THE ACTS OF FOREIGN PUBLIC OFFICIALS MAY BE INQUIRED into by the courts of other states.

SELECTMEN, IN THE ASSESSMENT AND COLLECTION OF TAXES, do not act as a court. Their acts are not regarded as judgments.. They are liable to an action by a party aggrieved for any wrongful exercise of their authority.

TAXES IN VERMONT MUST BE ASSESSED UPON THE LISTS in being and completed at the time the taxes are authorized.

SELECTMEN WHO ASSESS THE TAX AND ISSUE A WARRANT for its collection are responsible, if such tax is illegal by reason of informality in the listing.

FAILURE TO PERFECT THE LIST according to the convention of listers, invalidates any tax assessed thereon.

FORM OF ACTION TO RECOVER DAMAGES FOR AN ARREST under an illegal assessment must be determined by the law of the state where such action is brought. In this state plaintiff may declare either in case or trespass.

ACTION on the case for an illegal assessment of a tax levied in Vermont, and a subsequent arrest for non-payment thereof. The further facts appear in the opinion.

Kellogg and Handerson, for the defendants.

Hubbard, Edwards, and Tracy, for the plaintiff.

By Court, PARKER, C. J. The first question in this case is, whether the court have jurisdiction of the matter. The action

is an ordinary action of the case, alleging that the defendants, without right, made a certain assessment, or rate bill, against the plaintiff, and placed the same in the hands of the collector of the town of Chester, with a warrant for its collection, and that he, afterwards, by virtue of the warrant, imprisoned the plaintiff until he paid the tax. If the defendants were not authorized to assess taxes against any one, and they have usurped an authority to which they had no claim; or, if the plaintiff was not an inhabitant of the town of Chester, and thus not liable to any taxes in that place; there would seem to be no good reason why matters of that kind might not be as well proved here, as any other fact, which took place within another state.

The action is in its nature transitory, and if the proof might be more conveniently made in another state, that is not a matter affecting the question of jurisdiction. If the proof shows the plaintiff liable to a tax in Chester, where the defendants undertook to assess one, and shows, also, that the defendants had authority to make an assessment, an examination into the legality of their proceedings may doubtless involve the consideration of matters which could much more readily be settled by a tribunal more familiar with the laws of that state than we can be expected to be. But that does not test the question of jurisdiction, or seem to change the result of the inquiry upon that question. If we have jurisdiction to inquire whether the plaintiff was an inhabitant of Chester, and whether the defendants were selectmen of that town, there seems to be nothing in the fact that they were so, which ousts the jurisdiction of the court. There is no principle of comity by which the acts of one who is a public officer can not be inquired into in any other government than that in which he was appointed, and in which the acts were performed.

It is said that the court will not notice the penal laws, or the revenue laws, of another state. But this principle is not applicable in this case, nor can it be true to that extent. There is no attempt to enforce the penal or revenue laws of Vermont by this action. If there were, it would be held that this was not to be done through the instrumentality of the courts of another state; as for instance, if the attempt was to collect a tax assessed in Vermont by a suit here. The case *Pickering v. Fisk*, 6 Vt. 102, merely holds that a suit can not be sustained in Vermont, upon an official bond given to the treasurer of New Hampshire, for the purpose of enforcing rights which a third person might claim by the statutes of this state under such bond. In that of

Hunt et Ux. v. Pownal, 9 Id. 411, an opinion is intimated that an action against a town, for an injury occasioned by a defect of a highway in another state, could not be sustained in the courts of that state. But this case steers wide of any objection of that character. The plaintiff seeks to enforce no right or claim arising under any revenue, police, or other statute of Vermont. He alleges that the defendants illegally assessed a tax against him, and caused him to be imprisoned for non-payment. It is, in substance, that the defendants, under some pretense of right which did not exist, were guilty of a personal wrong to him. This is the character of an ordinary transitory action.

The defendants allege that they were lawfully authorized to assess a tax, and did so. We must necessarily inquire whether they had any such authority. If they had, unless their proceedings may be considered as the judgment of a court, we must also inquire into their regularity, notwithstanding their regularity or irregularity depends upon the laws of another government. To the judgments of courts of other states, when produced here to justify proceedings had under them in the jurisdiction where they were rendered, full faith and credit are to be given: Story's Conf. L. 500, sec. 598. But the principle does not seem to have been extended beyond this. We find no authority to show that the acts and doings of revenue or police officers of a state or nation, alleged to have been done by official authority, can be presumed to have been so done, and to have been warranted by the laws of the state or nation where the matter was transacted, and be, on such mere presumption, admitted as a justification of what would otherwise appear to be a personal wrong to a third person.

If the defense in this case set up the defendants as a court, and their proceedings, under which the plaintiff was arrested, as a judgment, the power under which they acted must be looked into, and their authority to decide upon the matters which they professed to decide, must be considered. We must in that case inquire whether they had a right to act as a court; whether the plaintiff was subject to their jurisdiction; and whether they had a right to render a judgment in such a matter; or, in other words, whether they had jurisdiction of the matter determined, and of the party or his property to be affected by the decision: Story's Conf. L. 492, etc. But the selectmen, in the assessment of taxes and in issuing their warrant for the collection of them, do not act as a court, and their acts are not regarded as judgments. This is so not only in this state, but it seems clear that

it is so in Vermont. If they act erroneously, and assess a tax, or issue a warrant for its collection, and thus interfere with the personal liberty of an individual, or his property, where they have no authority so to do, an action may be maintained against them by the party aggrieved. Thus, where a tax was assessed by the selectmen of a town, under a vote to raise money for an object not within its corporate powers, it was held that the tax was illegal and void, and the selectmen liable for the property distrained and sold in satisfaction of such tax: *Drew v. Davis*, 10 Vt. 506 [33 Am. Dec. 213].

The next question is, whether the plaintiff was liable to be taxed in the town of Chester, where these proceedings were had. If he was not, no further inquiry is necessary, for in such case there can be no justification. The case finds that the plaintiff removed from Chester some time between the fifth of March, and the first of April, 1838. The tax was voted on the former day. A new invoice or list was made up in that year, after the latter. The tax was assessed on the list of the previous year, and the inquiry therefore is, whether the money voted to be raised on the fifth of March, was by law to be assessed on the list made up in 1837, or whether it was to be assessed on the list to be made up subsequently, in the year in which the money was raised. If the latter, as the plaintiff contends, there is no question that he was not liable to this assessment, and that the defendants could not lawfully issue a warrant against him.

It is to be regretted that upon the points in this case, which involve the construction of the statutes of Vermont, we have not the benefit of decisions of the courts of that state bearing so directly upon the questions before us, as to leave little room for mistake respecting the true construction of those statutes. But the decisions of the supreme court of that state, although they do not cover the whole ground embraced in this case, may perhaps enable us to arrive at a conclusion, with a reasonable supposition that the result is the same as it would have been had the matter been adjudicated in the courts of that state.

It appears from the statutes of Vermont, in force at the time when the transactions which form the subject-matter of this case occurred, that a board of persons denominated listers was to be annually chosen in each town, whose duty it was in each year to take an account of the personal property, and make certain assessments upon persons, and every fifth year to appraise the real estate in their respective towns taxable by law; and in each year to make a list of all polls, and all property by them appraised

or assessed, at a certain rate per cent., etc., with the name of the occupant and owner, etc., and lodge the same with the town clerk of their respective towns on or before the twentieth day of June of the same year, for inspection. Provision was made for the correction of the lists, after which the listers were required, in each year, to make a general list of the polls and personal property, and return such list to the general assembly by the fifteenth day of October, of the same year. They were also required in every fifth year to make a general list of the real estate and property in their respective towns, with the appraisal, together with such assessments as they should have made on attorneys, physicians, etc., and made a like return thereof to the general assembly. There was a further provision for a meeting of listers in each county, once in five years, to "examine, average, and equalize the quantity of land, and the estimation and valuation of real estate, and also such assessments of any town, in such county, by adding thereto or deducting therefrom, such number of acres, and rate *per centum*, as shall render the quantity of land, and the valuation and assessments of the several towns in such county, just and equitable, comparing one with the other;" and they were to cause a certificate to be indorsed on the lists, describing the alterations made therein, which lists were also to be returned to the general assembly by the fifteenth of October. A committee of the general assembly were then to "examine the lists, and equalize the quantity of land, and the estimation and valuation of said property, together with said assessments, by adding to, or deducting from, the list of any county, such number of acres, and assessments, and such rate *per centum*, as shall render the estimation and valuation in the several counties just and equitable." These alterations were to be certified, and the lists returned to the listers in each town, and they were required to proceed and "finish their lists, by making the additions or deductions so made by the county and state average," and to make out and deliver to the town clerks of their respective towns, on or before the tenth day of December, in each year, a particular list of the polls, etc., averaged and corrected, with occupant and owner's name annexed, etc.: 2 Vt. Comp. L. 73-79. Upon the list thus made up, the selectmen were required to assess the polls and ratable estates their just and equal proportion of all taxes: 1 Comp. L. 416.

Although no direct decision is found in the reports of Vermont, upon the question on what list the money voted to be raised on the fifth of March, 1838, was by law to be assessed,

the case *Waters v. Daines*, 4 Vt. 601, seems to settle the principle which must govern the decision of it. That case related to a school tax, which was voted on the fifteenth of May, 1830, and was to be levied on the list of that year. It was not assessed within thirty days after it was voted, and was for that reason objected to, under a provision of the statute requiring such taxes to be assessed within thirty days after the vote raising the tax. Before touching upon this limitation, relating to the assessment of school taxes, Mr. Justice (now Chief Justice) Williams, referred to the law generally for the assessment of taxes, and said: "By the general law in relation to lists and listers, the lists are to be given in in the month of April. After they are given in, the listers are to add assessments by the twentieth of June, and also the appraisal of the real estate in those years when such appraisal must be made, and to add two folds in the month of September, and the whole list is not to be completed until the tenth of December. Taxes are required to be apportioned on the list of the polls and ratable estate, and it seems to me it would be proper that all the taxes voted as granted in any one year should be laid on one list, and that one completed or perfected." And he adds: "It is very clear that a vote to raise a tax on a list to be given in at any distance of time, would not be legal, as on a list to be made up one, two, or ten years thereafter. It is true, the decision of *Montville v. Haughton*, 7 Conn. 543, recognizes that a tax voted in November, 1823, on a list which was not, and could not be completed until August, 1824, was legal; but it seems to be founded on the usage or practice which had prevailed in that state, confirmed by a statute passed in 1826. Possibly there might be cases in which it would be better to lay the tax on the list which is making."

Although the question as to the right of towns to vote a tax on the list perfected, or on the list which is making between the first of April and the tenth of December, is not settled in that case, the provisions of the statute we have cited, and the remarks above quoted, lead to the conclusion that the tax of March 5, 1838, was rightfully to be assessed upon the list of 1837. The list of 1838 was not then commenced. It could not be completed until December following. If the town might have voted a tax to be assessed upon a list not begun, which certainly is doubtful if it be proper that all taxes be laid upon one completed, they did not do so, but voted it upon the list of 1837. Had they voted it on the list of 1838, it seems it could not have been assessed before a lapse of more than nine months,

which surely could not have been intended. The law, requiring school taxes to be assessed in thirty days, is considered in the same opinion as conclusive that the tax can not be voted on a list which is not to be completed until after thirty days from the voting of the tax. If what must be done in relation to a school tax, in this particular, may be done in relation to other taxes, that is sufficient upon this point of the case. We are of opinion, therefore, that it was proper and legal, not to say necessary, that the tax voted in Chester in March, 1838, should be assessed on the list of 1837, as was done.

In relation to this subject, there seems to be an essential difference between the laws of Vermont, and those of this state, where taxes are voted at the annual meeting in March, to be assessed upon an invoice and list taken and made up in April following. But here the invoice is to be completed, and the taxes assessed, in the month of May. The plaintiff having been regularly listed in Vermont in April, 1837, and remaining an inhabitant of Chester in March, 1838, when this tax was voted, was liable to be assessed there. The tax having been assessed on the right list, there seems to be no further exception to the proceedings of the defendants themselves, as selectmen. But various exceptions are taken to the proceedings of the listers, in making up the list, before it came to the hands of the defendants as selectmen, as the basis upon which they were to assess a tax. Upon this part of the case the plaintiff is met with the objection, that the defendants can not be held liable on account of any errors in the list, or any erroneous proceedings of the listers.

Here again there is a difference in the laws and practice of the two states, which leads to embarrassment, and shows that it would have been better had the plaintiff sought his remedy in the courts of Vermont, where the statutes and their construction are familiar. We have here no separate boards known as listers. By the laws of this state, towns may choose assessors, who, when chosen, constitute, with the selectmen, a joint board for the assessment of taxes. But such officers are rarely chosen. The selectmen take the account of polls and ratable estates, and make up what is here usually denominated an invoice, but in Vermont is termed a list, and they then assess the taxes upon it, and deliver them to the collector, with a warrant for their collection. For errors in making up this invoice there is no question that they are answerable, being their own errors.

But they are answerable beyond that. If the proceedings of

a town upon which a tax is based are not warranted by law, the selectmen who assess the tax and issue the warrant are liable. The principle, as we have already seen, seems to be the same in Vermont: *Drew v. Davis*, 10 Vt. 506, before cited [33 Am. Dec. 213]. Perhaps the decisions holding selectmen responsible, where the proceedings of the town had been erroneous, were supposed to be necessary, in order to give a party, of whom an unlawful tax had been collected, a sufficient remedy, where there was no provision by statute giving an action against the town. But the collector, also, has been held responsible for the validity of the tax, although he had no hand in making it, and very imperfect means, at least, of judging of the legality of the proceedings of the town, or selectmen: *Waters v. Daines*, 4 Vt. 601, before cited. Such was the rule here, prior to the statute of June 16, 1836.

The principle which seems to have governed this class of cases very extensively, if not uniformly, when no statute provision existed modifying the liability, has been, that the officers who assessed and collected the tax were liable for any substantial errors in the previous proceedings, affecting the legality of the tax; and this principle will hold the defendants answerable, not only for the regularity of the proceedings of the town, but also for those of the listers. And the case, *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550, seems to be a direct authority in this particular. The assessors in that state perform duties similar to those of the listers in Vermont, and in the case above cited did not leave an abstract of their assessments with the town clerk by the first of December, as they should have done, but it was left on the twentieth of December. The defendants were selectmen, and procured a rate bill to be made out on the list of assessments, including a tax against the plaintiffs, obtained a warrant for the collection of the taxes, and delivered it to the collector with directions to collect them. It was held they were liable, because the omission of the assessors had rendered the tax invalid. It was argued that they acted in pursuance of their duty, the law having imposed on them the burden of making out rate bills, and procuring warrants for the collection. But the chief justice said the true construction of the act in question was, that the selectmen were enjoined to make out rate bills on legal assessments, and if an assessment was illegal and void, it would be absurd to consider the law as requiring of the selectmen to cause a rate bill to be made upon it, and a warrant to be issued for its enforcement. We have not been referred to any decisions in

Vermont which seem to conflict with this view; and as the principles of the decisions there, so far as they go, seem to be in accordance with it, we are of opinion that if there was any substantial error in the proceedings of the listers, rendering the list invalid, the defendants who made the assessment, and directed the collection of the taxes, must be held answerable.

It is objected to the proceedings of the listers, that the county convention in 1837 ordered the number of acres in the list of Chester to be increased from eleven thousand four hundred and fifty to thirteen thousand, and that twenty-four per cent. should be added to the appraisal of lands. There was a controversy on the trial whether this had been done, and respecting the nature of the evidence which was competent for this purpose. There was evidence from the town clerk, in general terms, that the addition was made by the listers. The report of the clerk of this court, to whom the papers were submitted to report upon that subject, rendered it probable that it was not so in all cases in the assessment of this tax. But it is not necessary to consider this matter.

It appears affirmatively that the order of the county convention, for the addition of twenty-four per cent., has not been applied to the column of highway taxes, and the plaintiff objects, that for this reason the list was not perfected according to law, so that any taxes could lawfully be assessed upon it. Although the tax now in question is not a highway tax, and seems, therefore, not to have been assessed upon the column where the omission has occurred, the objection appears to be fatal. The particular form in which the list is to be made up and the alterations made, does not appear from the case; nor why there should be a column in the list for the assessment of the highway taxes, and another for the assessment of other taxes. But it is sufficient that this error, in not adding the twenty-four per cent. as directed by the convention of listers for the county, is an error in making up and perfecting the list, and not merely an error in the assessment of the highway taxes, upon a list duly made. There is, as we understand, but one list to be made for the assessment of all the taxes. To the valuation of that list, the convention of listers ordered an addition of twenty-four per cent. If this addition has been made to the part of the list upon which this tax was assessed, which it seems probable it has not in all cases, it has not been made to the column for highway taxes, in such a manner as to be applied to the assessment of those taxes, upon the list; and for this reason the list

has never been perfected according to the order of the convention of listers, and it has, therefore, never become a legal basis for the assessment of any tax.

We have been furnished with a copy of an opinion delivered by Mr. Justice Redfield, in a case between this plaintiff and the town of Chester, Windsor, February term, 1843, in which it is held that the list then in question "was not complete until the alterations required by the county and state committees were made. Until that time, it was merely in an inchoate state, so imperfect as no more to form the basis of any legal tax, than if it had been returned at any former stage in its progress." This seems decisive upon the point before us. If we may understand, from the statement in the case before us, that the listers made no addition of the twenty-four per cent. to the list after its return, but that the selectmen attempted to add it in their assessment of all other taxes except highway taxes, and did not add it in making up the column containing those taxes, the result must be the same. The addition to the list, ordered by the county convention, would not in such case be made. There would be no attempt to make it by the listers, and the attempt to supply the defect by the selectmen, in relation to a part of the taxes, could in no sense be regarded as a perfection of the list so that it could constitute a basis for the taxation in this case.

But the defendants object to the form of the plaintiff's action, and contend that if the assessment was void, and their warrant illegal, the action should have been trespass. Whether the action should be trespass or case is a matter relating to the remedy, and is to be determined by the laws of this state. The selectmen having no authority to assess a tax, and issue a warrant, for the want of a sufficient list trespass would well lie. But the plaintiff had an election to treat the wrongful assessment as the cause of the injury, and declare in case, or to regard an arrest by the collector as the act of the defendants, and declare in trespass: *Walker v. Cochran*, 8 N. H. 166; *Gilson v. Fisk*, Id. 404, and authorities cited.

There might have been a question respecting the measure of damages, the plaintiff being an inhabitant of Chester, and liable to taxation there at the time the tax was voted; but we have no occasion to discuss that matter, the parties having agreed upon the amount for which the judgment should be rendered, in case the action is sustained. Whether the principle suggested in *Walker v. Cochran*, and applied in *Cavis v. Robertson*, 9 N. H.

524, is applicable to a case where there was no sufficient invoice, or list, on which to assess any tax, upon the ground that the party was liable to contribute his proportion of the money to be raised along with others who perhaps have paid without objection, is a question which may be left for future adjudication, when a case shall arise requiring the decision of it.

Judgment for the plaintiff.

LIABILITY OF PUBLIC OFFICERS FOR THE ENFORCEMENT and collection of an illegal tax: See *Henderson v. Brown*, 2 Am. Dec. 164; *Stetson v. Kempton*, 7 Id. 145; *Ford v. Clough*, 23 Id. 573; *Pierce v. Benjamin*, 25 Id. 396; *Dress v. Davis*, 33 Id. 213.

WATKINS v. PECK.

[13 NEW HAMPSHIRE, 360.]

ADVERSE OR EXCLUSIVE USE OF WATER FLOWING THROUGH AN AQUEDUCT for twenty years is presumptive evidence of a grant of such use.

APPLICATION TO THE OWNER OF A SERVIENT TENEMENT for a grant of the right to use such water, if made within the statutory period of limitations, is evidence of an admission that the applicant had no title to such use by adverse possession. Otherwise, if such application is made after twenty years' adverse user.

NOTICE OF THE CONTENTS OF A NEWSPAPER CAN NOT BE CHARGED to a person simply because he is a subscriber.

ONE WHO IS PRESENT AND SEES ANOTHER SELL PROPERTY to which the former has title, without objecting to such sale or disclosing such title, may be estopped by his silence from setting up his title. To work such estoppel it must appear that the sale was made with full knowledge on the part of the owner.

PARTY IS NOT ESTOPPED FROM ASSERTING HIS TITLE by reason of his presence at a sale without having made any objection, unless the subject-matter of the sale is something in which his interest is direct and immediate. If his interest depends upon an intermediate interest which is not affected by the sale, he can not be estopped.

REPAIRS MADE UPON AN AQUEDUCT, without evidence of some agreement to that effect, can not be regarded in the nature of rent, or as an acknowledgment of a holding at the pleasure of the owner of the land through which the aqueduct runs.

GRANT UPON CONDITION THAT THE GRANTEE SHALL PERFORM CERTAIN ACTS will be presumed from an adverse user of twenty years and performance of the conditions during that time.

PRESUMPTION OF A GRANT FROM ADVERSE USER DOES NOT EXIST where the person against whom the presumption must operate was, at the expiration of the twenty years, incapable of making a grant.

GUARDIAN CAN NOT GRANT AN INCORPORAL HEREDITAMENT out of the land of the ward.

BILL in equity. The opinion states the case.

W. Bradley and Chamberlain, for the plaintiff.

S. Hale and Vose, for the defendant.

By Court, PARKER, C. J. The plaintiffs set up a right to have the water run from a spring on land formerly owned by Benjamin Bellows, through the land of the defendant, to the several houses occupied by them, and to keep in repair an aqueduct for that purpose. They produce no title deeds granting to them the waters of the spring, or the right of conveying it through the land of others; but they rely upon an uninterrupted usage, of themselves and those whose estates they have, to take it in a certain manner, for the term of more than twenty years, as evidence of a grant, or title; and they claim the right to continue to use the water, in the manner they have been accustomed to do for that period. The adverse, or exclusive use of water, in a particular manner, for the term of twenty years, furnishes presumptive evidence of a grant: *Bullen v. Runnels*, 2 N. H. 257 [9 Am. Dec. 55]. And this is as true in relation to water flowing through an aqueduct, for use at a house, by the occupants, as it is in relation to the water of a river, used for propelling machinery. The main question presented by the case is, therefore, whether the plaintiffs have shown such an adverse use, as entitles them to the benefit of the principle.

The evidence is clear that all the plaintiffs, or those under whom they claim, and whose estates they hold, have enjoyed, at their respective houses, the use of the water of this spring, for more than twenty years before this controversy commenced; and that it has, during all the time they have so used it, been brought through the land formerly owned by Stevens, and now held by the defendant. To the houses of some of the plaintiffs it had thus flowed for the term of near forty years. And during all that time those who have thus received the use of it after it passed the lot now owned by the defendant, have exercised the right of repairing the aqueduct, not only from that lot to their respective residences, but also in that lot, and from thence to the spring from which it is taken. During all that time the right of the plaintiffs, and those under whom they hold their lands, thus to take and use the water, has, so far as appears, not been contested by any one; nor is there any express evidence of any permission asked within the time, or of any sum paid for the use, or any acknowledgment that the use was at the pleasure of those through whose land the aqueduct passed.

These facts, if they stood alone, would furnish abundant evidence of title in the plaintiffs to take and use the water as they, and others whose estates they hold, have been accustomed to do for such period, and to ask the aid of the court: *Finch v. Resbridger*, 2 Vern. 390; 2 Cowen's Ph. Ev. 381, citing Gilb. Eq. 4, etc.; 2 Story on Eq. 204, 207. But there are other circumstances to be considered, upon which the defendant relies, as showing that the use was not in fact adverse to the right he now sets up in the owners of the Stevens lot, to control the use of the water at their pleasure.

It appears that in 1829 the aqueduct was out of repair, and measures were taken to relay it in a more durable manner. Abel Bellows then had charge of the Stevens estate, and he declared that those who did not join in making the repairs would lose their chance to have the water. But this does not show an assertion of a right to deprive them of it at the pleasure of those of whose estate he then had the charge. It was for the interest of that estate to have the repairs made, as the water there used was obtained by means of the aqueduct; and it seems therefore rather a call upon those who were supposed to be bound to make the repairs, and who of course had the right so to do, to perform a duty from which the Stevens estate, as well as themselves, would derive a benefit. If the testimony, upon the whole, shows such a use as to be evidence of a grant of the right to take the water on condition of keeping the aqueduct in repair, and permitting the occupants of the Stevens estate to take so much as they needed, or have been accustomed to do, then Mr. Bellows well declared the law, that those who did not comply with the condition upon which they held the right would lose the right itself.

It appears further, that during the time Bellows thus had charge of the estate for the heirs, the plaintiff Watkins applied to him to get a conveyance of a right to use the water. It does not appear that he admitted that he had no title, but the water was conveyed to his house somewhere from 1810 to 1816; and if this transaction took place within the term of twenty years after, it would be evidence of an admission that he at that time had no title, and thus might bind him, if he alone were concerned, on the ground that there was no sufficient evidence that he had had the use of the water adversely for the term of twenty years. If he had enjoyed the use adversely for a period of twenty years before the application, the case would be different, as we shall see hereafter. But none of the other plaintiffs appear to have had

any connection with that application, and Watkins derives his use of the water, not immediately from the land of the defendant, but through other persons, who have had the use longer, and whose rights may perhaps inure to his benefit upon this occasion.

The advertisement for the sale of the estate of Cochran can not conclude the plaintiffs, or be evidence that their enjoyment of the water was not adverse. Two of the plaintiffs are shown to have been subscribers to the paper; but a person, at the present day, can not be charged with knowledge of all the contents of a newspaper, merely because he is shown to be a subscriber to it. Nor is the clause in the advertisement of a character to show them that their rights were in question, even if they had read it. One half of the water of the spring came to that place, and the occupants had the use of the water there; and it would not have been a very violent presumption on the part of one who examined the advertisement, that the right of the heirs of Cochran, in one half of the spring, was to be sold, whatever that right might be, as was afterwards done.

But if those who saw the advertisement might have understood that a sale was to be made of their rights to the water, they were not bound, upon any such notice, to attend the sale in order to protest against it. A party who is present and sees another sell and convey property to which he may assert a title, without disclosing his title, or objecting to the conveyance, may be estopped by his silence from setting up his title; because under such circumstances his conduct would operate as a fraud upon the purchaser, if he might afterwards take from him what he had thus permitted him to purchase, without objection, from one who claimed to be the owner. And there does not seem to be any sound difference, in this respect, between a sale of real or personal property: *Runlet v. Otis*, 2 N. H. 167; *Morse v. Child*, 6 Id. 521; *Thompson v. Sanborn*, 11 Id. 201 [35 Am. Dec. 490]. But it must clearly appear that the sale was made with full knowledge on the part of the owner, in order thus to bind him. A supposition that a conveyance is to embrace property belonging to him, when it does not in fact, will not estop him: *Marshall v. Pierce*, 12 Id. 128. A party who has knowledge that another proposes to sell his land, or goods, without right, if that be all, may lawfully suppose that he will relinquish his purpose, or will not be able to find a purchaser. The maxim, *caveat emptor*, applies in full force, if the knowledge does not extend beyond that. It is no fraud in the owner not to leave

his business, and go to another place, for the purpose of giving a caution.

Nor can the conversation at the auction affect the rights of the plaintiffs, although it appears that some of them were present. A. Bellows stated the facts, and said he did not know whether the plaintiffs could hold the water. Lyman, the agent for making sale, said they could not, as the repairs were in the nature of rent. But being asked whether he would give a deed with warranty, he said he should sell only the right of the heirs; and that was all that he sold and attempted to convey. His previous declaration, that the plaintiffs could not hold, could not operate to enlarge the right of the heirs; and those of the plaintiffs who were present at the time can not be estopped from claiming what he did not sell upon that occasion. If there had been a distinct sale of all the spring, and the right to control the water at pleasure, Mrs. Bellows, who was not present, would not thereby be estopped from asserting a right to have the water flow to her house, in the manner it had been accustomed to do for near forty years; and so long as it thus flows there, she may permit those who have continued the aqueduct from that place, to continue the use of the water, even if, by reason of their having been present at the sale, they could not assert an independent right against the defendant. In order to estop a party from asserting a title, by reason of his presence at a sale without having made any objection, the subject-matter of the sale must be something in which his interest is direct and immediate. If there be an intermediate interest, upon which his depends, and that interest is not affected, he can not be estopped.

The repairs made upon the aqueduct, without evidence of some agreement to that effect, can not be regarded in the nature of rent, or as an acknowledgment of a holding at the pleasure of the owner of the land through which it is laid. The fact of repairing, standing alone, is rather the assertion of a right to enter upon the land where the aqueduct is laid, for the purpose of doing an act beneficial to the party entering, than the performance of a duty to the owner of the land, or an acknowledgment of a tenancy, or use, at will under him. It must clearly be regarded as the assertion of a right adverse to the owner of the soil, were it not that, in this case, the owners of the Stevens place had a beneficial interest in the repair, along with the others, by reason of the use which they had of the water. But this, again, can not show that those who made the repairs were holding the use of the water at the pleasure of him in whose

land the repairs were made, and who also had the use of it. It may serve to show that they held the use, and the right to enter and repair, upon the condition of furnishing the owner of the land with a certain quantity of the water, or such quantity of water as he was accustomed to take; and the performance of the condition may be essential to the continuance of the right.

A grant, upon condition that the grantee shall perform certain acts, may be presumed from a usage of more than twenty years to exercise the right adversely, and perform the duty connected with it, as well as an absolute grant may be presumed from the exercise of a right during that period, without any performance of a duty to the owner: *Mitchell v. Walker*, 2 Aik. 266, 270 [16 Am. Dec. 710]. Prescriptions may be upon condition: *Grey's Case*, 3 Co. 79; *Lovelace v. Reynolds*, Oro. Elia. 546, 563; *Brook v. Willet*, 2 H. Bl. 224, 234. And there seems to be no valid reason why usage might not show a grant of a perpetual right, upon the condition of the payment of an annual sum, or rent. Such grants are legal, notwithstanding recent circumstances are showing them to be inexpedient where they embrace large tracts of land.

The subsequent negotiation between the plaintiffs and the defendant, for a purchase, by the plaintiffs, is the strongest evidence to show that the use of the water on their part had not been adverse. If this had been within twenty years of the time when the water was first taken from the Stevens place, it must, if unexplained, be regarded as evidence that the use by the plaintiffs was permissive, and not under a claim of right, because, unexplained, it would be inconsistent with such a claim. But this was more than twenty years after the water had been carried to the houses of all the plaintiffs, unless that of Buffum forms an exception. The evidence of a right, as to the rest, founded upon the presumption arising from the use, had become perfect prior to this negotiation for a purchase, and under such circumstances the mere negotiation for a purchase can not take away the right which is shown to have existed before that time. There was no admission, in terms, on the part of the plaintiffs, that they had not a good title. The defendant had threatened to deprive them of the water unless they paid for it. They had no paper title to show, and they might well attempt to procure better evidence of their right, without destroying such evidence of title as already existed. It may be regarded as an attempt to purchase peace, notwithstanding "there had been no war." The defendant, it appears, had issued a manifesto.

But it is further objected, that the heirs of Cochran were minors at the time of his death, and that one of them had not arrived at full age when the sale was made to the defendant; and the defendant contends that no title could accrue or be shown from evidence of a use during this period, on account of this disability. The plaintiffs answer to this, that there was the care of guardians to protect the rights of the minors, and that a prescription is not affected by the circumstance that a party against whom it operates is an infant. But the plaintiffs' claim does not rest upon a prescription. There is no pretense that the use has extended beyond the time of memory; and we are of opinion, that had there been no sale to the defendant, Elizabeth Cochran, whose minority continued up to the sale, might, on arriving at full age, have successfully contested the right of any of the plaintiffs, if they could not have shown a use of the water by some of them, or those under whom they claim, for a period of twenty years before her right accrued. The plaintiffs must rely upon the presumption of a grant, arising from an undisturbed enjoyment of the use of it, flowing through the land owned by the defendant, for so long a period; which may be in the nature of a prescription, except so far as time is concerned. But notwithstanding the remark of Mr. Justice Story, in *Tyler v. Wilkinson*, 4 Mason, 402, we are of opinion that no grant can be presumed from an adverse use of an easement in the land of another, for the term of twenty years, where the owner of the land was, at the expiration of the twenty years, and long before, incapable of making a grant, whether the disability arose from infancy, or insanity: See *Guernsey v. Rodbridges*, Gilb. Eq. 3; cited 2 Cowen's Ph. Ev. 383.

Perhaps a disability intervening during the lapse of the term, but not extending to the termination of the period of twenty years, might not be sufficient to rebut the presumption; but it would be absurd to presume a grant, where it was clear that no such grant could have existed. And in this case a grant by a guardian, of an easement in the land of his ward, extending beyond the limit of the guardianship, is not to be presumed; because a guardian is not authorized to grant such incorporeal hereditaments out of the land of the ward. Nor can any grant from Cochran himself to Gage, Watkins, or Buffum, be presumed; because there was no use by either of them for the term of twenty years before his death, and the neglect of his minor child to assert a right can not raise a presumption of a grant by

him. If, therefore, the other heirs were barred from contesting the right of the plaintiffs, because the circumstances warranted the presumption of a grant from them, a successful resistance on the part of their co-heir, Elizabeth, might have precluded the plaintiffs from the use of the water, on account of the indivisible nature of the right to keep the aqueduct there, and to draw the water through the land in which she had an interest; at least, this might be so until some partition of the estate, by which the portion of the land through which the aqueduct passes should be assigned to the others. The guardian of Elizabeth joined in the sale, but it was to sell her undivided interest, and we are of opinion that this does not merge the right which she had to controvert the title of the plaintiffs, and that the defendant, in virtue of the purchase of her individual share, may exercise any rights to which she was entitled.

Against her, then, some of the plaintiffs could not maintain a right, if the matter stood upon their use of the water alone, because there is no pretense that they had had a use of it for twenty years prior to the time when her right accrued and her disability existed. But these plaintiffs, with the exception of Buf-fum, take the water not directly from the Stevens lot, but from the land of Mrs. Bellows; and if, as before suggested, she can maintain a right to have a certain quantity of water run to her land, through the aqueduct, she may use it, or permit others to use a portion of it, or let it run to waste. The defendant, in virtue of the title of Elizabeth Cochran, has no right to object that they are not entitled to the use, so long as she permits it. And this brings us to the question whether the case shows a use of the water by her, and those under whom she claims, for the period of twenty years prior to the death of Cochran.

There is a great want of precision in fixing dates, throughout the whole testimony. Some of this may have been unavoidable, from lapse of time and the nature of the case. In some instances, the time might, undoubtedly, have been fixed with greater accuracy. When we come to inquire respecting the time that Townsley first brought the water from the Stevens place, which was the commencement of the use on which the plaintiffs rely, the evidence is, that he moved into the house now occupied by Mrs. Bellows about the year 1796 or 1797; and that the water was taken from the "Stevens house," to the "Sarah Bellows house," within one or two years after he moved into it, as the witness believes. The logs were laid down by Townsley, and by Joseph Wells, who then occupied the "Mead

house," to which the water was carried at the same time. This testimony stands uncontradicted; and, upon any reasonable construction of it, the water must have been taken to those houses prior to the year 1800: *Cutts v. King*, 5 Greenl. 482. It was carried from the house occupied by Mrs. Bellows before Townsley left it (which was in 1812), to Gage's, and continued on to Watkins, somewhere about that time. This was the situation of it at or about the time Cochran purchased the Stevens lot, and thus it continued, without objection on the part of any one, up to the time of his death, which, according to the testimony, took place in 1820 or 1821. From the time the aqueduct was thus continued on beyond the Stevens place, those who took it, and had the use of the water, repaired the aqueduct, not only from their places of residence to that place, but beyond, to the spring. It seems clear, then, that for more than twenty years prior to the decease of Cochran, the water had been accustomed to run to the premises now owned by Mrs. Bellows and Mead, and that the owners and occupants of those estates had the uninterrupted use of it, and had also exercised the right of making repairs on the aqueduct. The presumption of a grant, to the extent of the use thus shown, arises before the decease of Cochran; and the right of Mrs. Bellows and Mead to have the water flow as it had been accustomed to do, to their lands, is not impaired by the decease of Cochran, and the minority of any of his children.

It appears from the testimony, that the manner in which the water has been taken from the house owned by Mrs. Bellows, to those of Gage and Watkins, has not increased the quantity drawn. When it was brought to that place, by Townsley, it was received into a cistern at the bottom. A similar cistern stood by the side of that, into which the surplus water was conveyed, by a tube, connecting them near the top. The logs laid to Gage's were connected with the cistern which thus received the surplus water, and took merely the quantity of water which before that time had been conveyed from that cistern, "by a board trough lying above the ground." The rights of the plaintiffs, Gage and Watkins, therefore, as they took only the surplus water at the house of Mrs. Bellows, may not be dependent upon the length of time which they have used the water, but upon the agreement which they have made with those who have owned the estate which she possesses. It is sufficient for the purpose of this case that she admits their right, and that they appear, therefore, to be lawfully possessed of what they claim. And it

is for this reason that the defendant can not object that they have not been possessed for a term of twenty years, during which no disability existed. As he has no right to prevent the water from flowing to her land, he has no right to prevent them from using it. A change in the mode and objects of the use, without increasing the quantity, is no violation of the right: 2 N. H. 255. Whether they can lawfully enter upon the defendant's land to repair, except as her servants, and in her right, is a question which we are not required to settle upon the present occasion. Having a right, they may join in this suit: *Reid v. Gifford*, 1 Hopk. Ch. 416. It has been objected that a prescription must be certain, being but the presumption of a grant; and that there is here too great an uncertainty as to the quantity of water to be taken, and to be left at the Stevens house. But there may be as great certainty attained here, as there is in divers cases stated in Com. Dig., Prescription, E, 3, which were held to be good prescriptions.

Upon the principles which have thus been stated, the right set up by the plaintiff Buffum is not maintained, as the branch of the aqueduct to his house is not dependent upon that which runs to the house of Mrs. Bellows, but is taken directly from the land of the defendant, and his use of the water commenced but a few years before the decease of Cochran. As to his heirs and representatives, therefore, who have come in as parties, the bill must be dismissed.

As to the other parties, let the case be committed to a master, to report what quantity of water usually flowed to the houses of Mrs. Bellows and Mead for the term of twenty years prior to the decease of Cochran, and what was used at the premises of the defendant.

PRESUMPTION OF GRANT OF EASEMENT: See *Sims v. Davis*, 34 Am. Dec. 581; *Johnson v. Jordan*, 37 Id. 85; *Worrall v. Rhoads*, 30 Id. 274, and cases cited in note thereto.

SUBSCRIBER TO A NEWSPAPER IS NOT THEREFORE NECESSARILY CHARGED with notice of its contents: *Beltshoover v. Blackstock*, 27 Am. Dec. 330.

CONCEALMENT OF TITLE, WHEN OPERATES AS AN ESTOPPEL: See *Engle v. Burns*, 2 Am. Dec. 593; *Davis v. Simpson*, 9 Id. 500; *Kid v. Mitchell*, Id. 702; *Storrs v. Barker*, 10 Id. 316; *Wills v. Higgins*, 13 Id. 235, and note; *Buchanan v. Moore*, 15 Id. 601, and note; *Thompson v. Sanborn*, 35 Id. 490, and prior cases in this series collected in note.

THE PRINCIPAL CASE IS CITED in *Stillman v. White Rock Mfg. Co.*, 3 Woods & M. 550, to show what use of water will not be sufficient to warrant the presumption of a grant of an easement; and in *Edson v. Munsell*, 10 Allen, 568, to the effect that a trustee can not grant an easement out of the estate of his ward.

TENNEY v. EVANS.

[18 NEW HAMPSHIRE, 462.]

AFFIDAVITS OF JURORS MAY BE RECEIVED IN EVIDENCE in exculpation of themselves and in support of their verdict, when such verdict is impeached on the ground of the improper conduct of the jury.

VERDICT WILL BE SET ASIDE UPON ITS APPEARING that a juror had repeatedly said before the trial, that the plaintiff would succeed, taken in connection with the fact that the plaintiff had refused to go home one night, for the express purpose of staying and seeing some of the jurors.

TROVER. After a verdict for the plaintiff, the defendant moved to set it aside, on the ground of misconduct of the jury. To rebut the testimony of misconduct, affidavits of the jurors were offered and admitted. The further facts appear in the opinion.

Perley, for the plaintiff.

Pierce and Fowler, for the defendant.

By Court, GILCHRIST, J. The affidavits of the foreman and of one of the jurors, have been laid before us for the purpose of removing any impression unfavorable to the verdict caused by the evidence offered to impeach it. The decisions on the admissibility of the evidence of jurors, in relation to their verdict, are contradictory. In the case of *Saville v. Lord Farnham*, 2 Man. & R. 216, Lord Tentarden asked Brougham, in a manner that implied a doubt, whether he could read the affidavit of a juror? The learned counsel replied that "he could not, as to the conduct of the jury." He was then endeavoring to show that the jury did not concur in a verdict which had been entered for the defendant. In the case of *Rex v. Wooler*, 2 Stark. 111, Lord Ellenborough said that the affidavit of a juror could not be received in any case. And it has been held that their affidavits could not be received to show that they misapprehended the instructions of the court, nor, where there is evidence of improper conduct by the jury or the prosecutor relating to the trial, to prove in general terms that their verdict was founded upon nothing but the law and the evidence: *Tyler v. Stevens*, 4 N. H. 116 [17 Am. Dec. 404]; *State v. Hascall*, 6 Id. 352; nor to impeach the verdict or prove a mistake, or any improper conduct by themselves: *Owen v. Warburton*, 1 Bos. & Pul., 2d ed., 326; *Vaise v. Delaval*, 1 T. R. 11; *Jackson v. Wilhamson*, 2 Id. 281; *Dana v. Tucker*, 4 Johns. 487; *Jackson v. Dickenson*, 15 Id. 309 [8 Am. Dec. 236]; *Ex parte Caykendoll*, 6 Cow. 53; *Sargent v. —*, 5 Id. 106; *People v. Columbia C. P.*,

1 Wend. 297; *Bridge v. Eggleston*, 14 Mass. 245 [7 Am. Dec. 209]; *Hannum v. Belchertown*, 19 Pick. 311; *Murdock v. Sumner*, 22 Id. 156; *Bishop v. Williamson*, 8 Greenl. 162. And there are many other decisions to the same effect.

But where evidence has been introduced *aliunde* to impeach the verdict by showing improper conduct of the jury, or attempts upon them by a party, the affidavits of jurors have been received in exculpation of themselves, and in support of the verdict. And for this there are substantial reasons. The motives and characters of jurors, who are bound by their oaths and consciences to a strict impartiality, and who perform so important a part in our jurisprudence, should not be assailed without giving them an opportunity for defense. "To exclude the testimony of jurors," as was said by Parker, C. J., in *The State v. Hascall*, 6 N. H. 361, "in all questions affecting their verdict, would neither be just to the parties nor to the jury." Moreover, the trial by jury would soon fall into disrepute, if a verdict could be set aside upon evidence furnished solely by an unsuccessful party, who, if not corrupt and forsworn himself, has at least a strong interest to procure testimony unfavorable to the verdict, and whose friends and agents, of whom there is usually no lack, and from among whom his witnesses are usually drawn, may be presumed to share his feelings. And it has been held by this court that the affidavits of jurors were admissible to prove that papers calculated to have an influence upon the case, and which, it was alleged, were shown them, were not in fact shown them: *State v. Hascall*, Id. 352.

On a petition for a new trial, where it was averred that a juror was hostile to the petitioner, his affidavit was admitted to explain his feelings towards the petitioner: *Haskell v. Beckett*, 8 Greenl. 93. On a motion for a new trial, upon the ground that one of the jurors had prejudged the case, he may be heard to explain the language and conduct imputed to him: *Taylor v. Greeley*, 3 Id. 204. Such evidence is admissible in exculpation of the jurors, and to support the verdict: *Dana v. Tucker*, 4 Johns. 487. We have, therefore, read and considered the affidavit of the foreman, in connection with the other evidence; and also the affidavit of one of the jurors, in relation to the foreman's conduct in the jury-room, as it corroborates the statement of the foreman, is in exculpation of him, and tends to support the verdict. There seems to be no reason why he should not be permitted to rebut the charge of partiality by his own evidence, tending to show that his acts were inconsistent

with the existence of such a feeling; and if he may do this, he may surely offer evidence in corroboration of his statements, from one who knows whether those statements are true.

But after giving its due weight to all the evidence, we are of opinion that the verdict should be set aside. The assertion of the foreman, repeatedly and positively made before the trial, that the plaintiff would succeed, connected with the plaintiff's expressed intention "to stay and see some of the jurors," indicate that these two persons had stronger sympathies on the subject of the trial, than should have existed. The evidence, notwithstanding the explanation given of it, shows a stronger feeling for the plaintiff than is consistent with the idea that all these declarations were merely in jest. And, after making all proper deductions from the evidence, and looking as leniently as possible upon the motives of the foreman, enough remains to render it doubtful whether he were a perfectly impartial juror—a point upon which no doubt should ever exist. No one would willingly trust his life, or even his property, to a jury composed of twelve persons, each of whom had made similar declarations to those proved in this case. The foreman knew that he had said all these things; and it is somewhat suspicious that he did not ask to be excused from trying the case. The tendency of ignorant or unprincipled parties, "to see some of the jurors," as in this case; to tamper with them; to insinuate their own views of their controversies into the minds of weak or unsuspicious jurors, in the form of supposed cases; and the innumerable arts of which low cunning will avail itself to accomplish its dishonorable purposes, although it may thereby destroy all confidence in the administration of justice, can not be too severely reprobated. The law anxiously strives to secure impartial jurors, by causing them to be selected by lot, and this renders all previous corruption nearly impossible. But it is a part of the price we pay for this benefit, that weak-minded and incompetent men will sometimes be selected; and no one can calculate in how short a time a weak man, or one careless of his grave duties, may be prejudiced or seduced into a wrong course. A greater evil could hardly befall society, than, with institutions like our own, the loss of the public confidence in the entire impartiality of juries; and the fearful consequences of such a result must ever be present to the minds of all who are called upon to determine questions like the present.

Verdict set aside.

EXPRESSION OF OPINION BY JUROR IN FAVOR OF THE SUCCESSFUL PARTY, when ground for new trial or setting aside the verdict: See *Nemagus v. Pe-*

ple, 12 Am. Dec. 157; *French v. Smith*, 24 Id. 616; *Hilton v. Southwick*, 35 Id. 253, and note, 256.

AFFIDAVITS OF JURORS TO IMPEACH OR SUSTAIN THEIR VERDICT: See *Apthorp v. Backus*, 1 Am. Dec. 26; *Harris v. Huntington*, 4 Id. 728; *Forester v. Guard*, 12 Id. 141, and note; *Craigford v. State*, 24 Id. 467, and note; *Elledge v. Todd*, 34 Id. 616, and note; *Smith v. Eames*, 36 Id. 534.

In *Woodward v. Leavitt*, 107 Mass. 470, in commenting upon the rule laid down in the principal case, that the affidavits of jurors may be received in exculpation of themselves, in regard to matters which took place in the jury-room, the court said that "no satisfactory reason had been assigned for the rule."

RUSSELL v. ABBOTT.

[13 NEW HAMPSHIRE, 475.]

MAKER OF A NOTE, WHO ON A NEW CONSIDERATION, and with full knowledge of the circumstances under which it had been given, promises to pay the same, can not defeat an action thereon, because it had been originally obtained without consideration, and through false and fraudulent representations.

SUCH PROMISE, EVEN IF MADE AFTER AN ACTION ON THE NOTE has been commenced, relates back to time of the execution of the note, and is sufficient to sustain the action.

ASSUMPSIT on a promissory note. The defense set up that the note was given through false and fraudulent representations of the payee, and without consideration. The jury found that after the commencement of this action, the maker promised to pay the note, on a new consideration, and with a full knowledge of the facts under which it had been given, and under the instructions of the court rendered a verdict for the plaintiff. Defendant moved for a new trial.

Farley, for the defendant.

O. H. Atherton, for the plaintiff.

By Court, PARKER, C. J. The case does not find, under what particular circumstances the note was given, nor whether the defendant, at the time of making it, received anything which was supposed to furnish a consideration. The statement is only that the defendant introduced evidence to show that he was induced to give the note by the false and fraudulent representations of the intestate, and that it was given without consideration.

If the defendant received something, which it was supposed at the time was an adequate consideration, there is no evidence that he ever returned what was thus received, or took any measures to rescind the contract, and the case would be in principle,

like the cases *Campbell v. Fleming*, 1 Ad. & El. 40, and *Ayers v. Hewett*, 19 Me. 281. But, if the plaintiff received nothing at the time the note was executed, we are of opinion that the note itself, purporting to be for value received, and thus to be founded on a sufficient consideration, can not with propriety be considered entirely void, so as to be incapable of ratification. Fraud does not render a contract void, except at the option of the party defrauded: *Id.* 287. The defendant having afterwards received a consideration, and promised to pay the note, with full knowledge of all the facts, had no longer any such option. If there had been fraud, it was purged by the new agreement. If he had a defense before that time, he then waived it. In the language of Mr. Justice Parke, after the defendant, "knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; and the fraud could do no more than entitle him to rescind." *Campbell v. Fleming*, 1 Ad. & El. 40.

The only question remaining is, whether this action can be sustained—the new consideration and promise being after the commencement of the suit. If the action had been founded on this promise, it is apparent that it would not support it. But such is not the fact. The action is founded on the note, which purports to be on a sufficient consideration; and the defendant, by his undertaking to pay it, has taken away the objection to it which before existed, and is precluded from setting up the defense of which he might otherwise have availed himself. The case is different from *Merriam v. Wilkins*, 6 N. H. 432 [25 Am. Dec. 472], where the suit was upon a note executed by one who was an infant at the time, and it was held that the plaintiff could not avail himself of a new promise, made after the action was commenced. That decision, which overruled *Wright v. Steele*, 2 Id. 51, is perhaps not to be regretted, notwithstanding the fact, that the contracts of infants being now generally regarded as voidable rather than void (7 Id. 372), no insuperable objection would seem to have existed to holding that a ratification, after action brought, might avail to sustain it. That case went upon the principle that the note of an infant, until it is ratified, furnishes no ground of action. The court hesitated to call it void, because it was capable of ratification.

But we think that the doctrine there held, in relation to the contracts of infants, can not be extended to cases of this character, for the reasons before suggested. Here the defendant had a right to rescind, or an option to treat the contract as void.

When he saw fit to receive a consideration, and to affirm the note, the affirmation, by taking away his option to consider the note fraudulent or not, relates back to the time of its execution; and on principle, therefore, must avail to sustain the action, notwithstanding it had been commenced before the ratification. For these reasons there must be
Judgment on the verdict.

PIKE v. HAYES.

[14 NEW HAMPSHIRE, 19.]

STATEMENTS AS TO THE BOUNDARY LINES OF CERTAIN LAND, made by a deceased owner, are admissible in evidence against such owners' privies.

STATEMENTS MADE BY A MARRIED WOMAN AS TO THE BOUNDARY LINES of land owned by her, are not presumed to have been made under her husband's coercion, and are admissible in evidence, especially when repeated after his death.

TRESPASS quare clausum fregit. Both parties were children of common parents, who, in their life-time, were the individual owners of separate parts of one farm. The plaintiff had inherited the part formerly owned by the husband, the defendant that of the wife. To establish the *locus in quo*, certain statements of the wife as to the boundary line between her land and that of her husband were admitted in evidence, against the plaintiff's objections. Verdict was given for the defendant.

Hale, for the plaintiff.

Christie, for the defendant.

By Court, GILCHRIST, J. The declarations of Mrs. Hayes do not come within the description of declarations against interest. When she made them, there was no controversy about the boundaries of the respective lots. No person set up any claim to the *locus in quo* which she was called upon to resist, nor did she admit that the land of which she was in possession belonged to another. They were not declarations against her interest, unless it be against the interest of a landholder to admit that his land has any boundaries whatever. They were simply statements where the boundary was between her land and that of her husband, and they were nothing more. She knew where the boundary was, probably, and had no motive to make a misstatement about it. If admissible, they must be so on some other ground than their probability derived from their being against

her interest. The effect of her declarations was, that they tended to prove that the land which her heirs claimed by descent from her, did not belong to her; but they might have that effect without coming within the legal definition of declarations against interest.

But the evidence was admissible on another ground. It was a statement by a deceased owner of land, where her boundary was, and as such it binds her and her privies. A declaration by a person in possession that he held as tenant to the deviser, is binding upon all claiming under the tenant: *Holloway v. Rakes*, cited by Buller, J.: *Davies v. Pierce*, 2 T. R. 55. Copies of a bill and answer in a suit by a vicar for tithe hay against S. L., then occupier of the close, and from whom the defendant purchased, denying the vicar's right, and setting up a right in the ancestors of the plaintiff, upon which the vicar abandoned the suit, were holden to be evidence against the defendant: *Countess of Dartmouth v. Roberts*, 16 East, 334. In *Jackson v. Davis*, 5 Cow. 129 [15 Am. Dec. 451], it is stated by Sutherland, J., as a general position, that a party is as much affected by the acts and acknowledgments of his predecessors as though they were his own. To the same effect are the cases of *Jackson v. Bard*, 4 Johns. 230 [4 Am. Dec. 267]; *Jackson v. Myers*, 11 Wend. 533; *West Cambridge v. Lexington*, 2 Pick. 536; and *Doe v. Pettitt*, 5 Barn. & Ald. 223. In *Jackson v. McCall*, 10 Johns. 377 [6 Am. Dec. 348], the point now before us is expressly settled. It was there held that a statement by a deceased owner of land, under whom the plaintiff claimed, where the boundary was between his land and that of the defendant, was evidence for the defendant. This decision does not conflict with the case of *Shepherd v. Thompson*, 4 N. H. 213. There the defendant offered evidence that persons, at the time in possession of the close which the defendant claimed, showed an oak tree as the boundary of the close; but the evidence was held incompetent, on the ground that it must be presumed to have been their interest to extend the boundaries of the lot, and their declarations in favor of their interest were not evidence. But in that case there was no privity between the former occupants of the land and the party against whom their declarations were offered, and that fact sufficiently distinguishes it from the present case. We are of opinion that the declarations of Mrs. Hayes were competent to be submitted to the jury, unless there be some objection to them on account of her being a married woman at the time some of them were made.

As all the declarations went to the jury without discrimination, it is necessary to inquire whether those made during coverture were admissible. It did not appear that they were made in presence of her husband, or that in making them she was influenced by him. That she was not under his influence in respect to them, appears from the fact that she made the same declarations after his death. If they should be rejected, it must be on the ground that a wife, in all her statements which could by possibility affect the interests of her husband, must be presumed to act under coercion. It has been held that a wife, accompanying her husband in the commission of a crime, is presumed to act under his coercion, and consequently without any criminal intent: *Rex v. Knight*, 1 Car. & P. 116; *People v. Davis*, 1 Wheeler's Crim. Cas. 230. But we do not understand that the presumption of coercion extends far enough to embrace a case like this. Professor Greenleaf states that the rule excluding the testimony of a wife is analogous to that which excludes confidential communications made by a client to his attorney: Sec. 338. Such seems to have been the opinion of the court in the case of *Coffin v. Jones*, 13 Pick. 441, although the point was not necessary to the decision of the case. There is no reason why the wife, after the death of her husband, should not state facts which came to her knowledge from other sources, and not by means of her situation as a wife; and her knowledge of the boundary in this case she did not procure from her husband. But it is enough for this case to say that her declarations are like the declarations of any other owner of land, and binding upon her privies, there being no presumption that they were made under coercion; and if they were, it would be sufficiently rebutted by the fact that she repeated them after the death of her husband.

Judgment on the verdict.

DECLARATIONS CONCERNING BOUNDARIES, WHEN EVIDENCE: See *Deming v. Carrington*, 30 Am. Dec. 591, and prior cases in this series cited in note thereto; *Beecher v. Parmele*, 31 Id. 633; *Felder v. Bonnett*, 37 Id. 545.

LEDDEN v. COLBY.

[14 NEW HAMPSHIRE, 33.]

DEATH OF A PARTNER MUST BE PROVED IN AN ACTION BY THE SURVIVING PARTNER TO RECOVER A DEBT DUE THE FIRM, ALTHOUGH IT NEED NOT BE ALLEGED.

DEBT on a judgment brought by the plaintiff, as surviving partner of the firm of Ledden & Abbot. There was no allegation or proof of the death of Abbot. Verdict was given for the plaintiff.

J. Eastman, for the defendant.

S. Emerson and Hale, for the plaintiff.

By Court, PARKER, C. J. It appears to be clear from the authorities, that in a suit by a surviving partner, to recover a debt due the partnership, he need not aver in the declaration the death of his late partner: *Ditchburn v. Spracklin*, 5 Esp. 81; *Bernard v. Willcox*, 2 Johns. Cas. 374; though it is more usual to do so: 1 Chit. Pl. 12. There is, however, no ground to say that because the averment is omitted, it is not necessary to prove the fact; for though the action may be well brought without alleging the death, unless on trial there be evidence of the death presented, there would be a manifest variance between the declaration and the proof: 1 Chit. Pl. 6; *Eccleston v. Clipsham*, 1 Saund. 154, note (b). There are some facts, it is true, which must be proved if averred, but which yet need not be proved, if not averred. But the mere making an averment of a fact necessary to be proved to establish a case, can never take the place of that proof. There would be a variance, had the plaintiff not alleged the death of his partner. How can there be less a variance because he has alleged it?

Perhaps the allegation of the plaintiff might have been specially traversed by the defendant: 1 Saund. 154, note (1); but he was not obliged to take that course. The general issue puts all matters in issue, and the plaintiff must make out at least a *prima facie* case on his declaration: 1 Chit. Pl. 477; 2 Stark. Ev. 140, note (u), 463, 464. This he by no means does when, as in the present instance, he styles himself a surviving partner, and shows a judgment in favor of himself and another, which other must be presumed alive until the contrary be shown. On these grounds we must set the verdict aside and order a

New trial.

In *Holmes v. De Camp*, 3 Am. Dec. 293, it was held that where a partner had died, and there had been an account stated between the surviving partners and a firm debtor, the surviving partners could sustain an action thereon without alleging the death of the other partner and the survivorship, as the stating of the account was in the nature of a new promise to the survivor.

DOWNER v. HOLLISTER.

[14 NEW HAMPSHIRE, 122.]

JUDGE IS NOT DISQUALIFIED FROM ADMINISTERING AN OATH to his brother.

ONE SUMMONED TO APPEAR AT A GIVEN HOUR is not in default if he appears before the next hour is struck.

PARTY WHO ATTENDS AT A GIVEN HOUR, PURSUANT TO NOTICE, and finds either the magistrate or the opposite party absent, is bound to wait for the expiration of the hour before taking any steps prejudicial to the latter's rights.

DEBT on a bond for the relief of poor debtors, executed by one Howard as principal, and the defendant and one Savage as sureties. It appeared that the poor debtors' oath had been administered to Howard, and a certificate of his discharge issued by two magistrates, one of whom was a brother of Savage, on November 25, 1841. The plaintiff objected to the admission of this certificate on the ground that it was prematurely issued. Verdict was given for the plaintiff. The further facts appear in the opinion.

Bellows, for the plaintiff.

Morrison, for the defendant.

By Court, GILCHRIST, J. The objection that one of the magistrates was a brother of one of the sureties in the bond, must be overruled, as the point has already been settled. In the case of *Allen v. Bruce*, 12 N. H. 418, it was held that such a relationship did not disqualify a person from administering the oath to a poor debtor.

Upon the other point raised in the case, but little authority is to be found. We have met with two cases only in which it was examined at all, although others may have escaped our observation. It is held in the case of *Banks v. Johnson*, 12 N. H. 445, that in general, a party who has given notice of a hearing at a particular hour, is required to proceed with his case within the hour, unless the matter is postponed. Mr. Chief Justice Parker says in that case: "What period is to be regarded as within the time, seems not to be well settled. It can not be required that they should proceed at the precise moment indicated by the notice. Any time within the hour has always been considered as within the time. * * * The adverse party can not be bound to await the pleasure of the debtor, or of the justices."

In the case of *Niles v. Hancock*, 3 Metc. 568, the creditor was notified that the examination of the debtor would be at ten o'clock on a certain day, but he did not appear. The magistrates remained at the place from ten o'clock until ten

minutes past eleven, when they left the place; but within a short distance they met the debtor, who had not before appeared, returned with him, and administered the oath to him; and it was held that he was legally discharged. It was said in that case, by Mr. Justice Dewey, that the plaintiff had not been deprived of any privilege which he intended to exercise of appearing before the magistrates at the hour appointed, and opposing the discharge, by the administration of the oath at a later period; that there was no inflexible rule that every case of this kind should be proceeded in within the hour appointed, and that at the moment the hour expires there is no discontinuance of all cases not then brought before the consideration of the magistrates. The learned judge states that it has generally been understood to be the rule of law, that a party who shall duly appear at the time named, if no proceedings are had in relation to the matter in consequence of the absence of the magistrate, or of the party at whose instance the summons was issued, shall not be liable to be proceeded against in his absence, after the expiration of an hour.

If, then, the party come within the hour, he will be in season, according to *Banks v. Johnson*; but Mr. Justice Dewey thinks there is no inflexible rule that the case must be proceeded in within the hour appointed. In practice, the question often arises, as every professional man knows, whether a party is too late when a certain hour is fixed for his appearance; but the unwritten law, which has held when a party has been summoned to appear at ten o'clock, for instance, "that it is always ten o'clock until it is eleven," has also decided those questions, as they have not made their appearance in courts of law. We have no doubt, however, both from the reasonableness of the rule, and because men have adapted themselves to it in the conduct of their business, that, as a general rule, if a party be summoned to appear at a given hour, he will be in season if he appear when or before the next hour is struck. If ten o'clock be the time, it will be sufficient if he appear at or before eleven. And we think, also, that a party who attends at a given hour, pursuant to notice, and finds that the magistrate is not arrived, is bound to wait until the expiration of the hour; and if the other party be not present, is bound to wait the same time, before taking any steps that may prejudice his rights. And in all cases, the party giving the notice is bound to wait until the expiration of the hour for his opponent to appear. The application of this rule to the facts before us would settle this case for

the plaintiff, and would show that the certificate was invalid, as it appears that the plaintiff came within the hour, and found that the oath had been administered and the debtor was gone. But there are some facts showing how their duty was performed by the magistrates, which require some comment.

Between three and four o'clock the creditor's attorney arrived with his witnesses, and requested the justices to recall Howard, that he might examine him, and have a hearing upon the application. What should they have done? As a tribunal bound to exercise their judgment, their first duty was to hear, that they might know how to decide. It is true, that the oath had been administered, but they might have refused to issue a certificate, unless Howard would return and submit to an examination, and that in this case would have been a proper exercise of their judgment and discretion. They refused to recall the debtor, and their reason was, that the time for administering the oath was arrived when it was taken. True, the clock might have struck three, but the time for the hearing was not passed, until they had waited a reasonable space for the appearance of the creditor. The mere administration of the oath was not the whole of their duty. If it had been, it might as well have been performed by any justice without any notice. Their duty was to administer the oath after a hearing, or a reasonable opportunity for one, and they should have notified Howard that they would issue no certificate unless he would return and submit to an examination. So short a time had elapsed since his departure, that this might have been done without inconvenience. Punctuality is a great virtue, doubtless, but to hear both sides, and to do justice, is a greater.

Judgment on the verdict.

TIME FOR APPEARANCE IN JUSTICES' COURTS.—The general rule laid down in the principal case, that a party who is required to put in an appearance at a given hour at a stated place, is not in default if he appear within an hour from the time stated, and that within such time no proceedings can be taken to his disadvantage, has, so far as justices' courts are concerned, been universally acted upon. In the principal case, the court referred the origin of the rule to the unwritten law, and upheld its application, both on account of its inherent reasonableness, and because the profession had uniformly adapted themselves to it in the conduct of their business. At the present day, the statutes of the various states regulating proceedings in justices' courts have formulated the rule substantially as laid down in the principal case. The statutes of California (Code of Civil Procedure, sec. 850) and of New York (Code of Civil Procedure, sec. 2893), which may be taken as examples of such enactments, provide, that after the notice requiring an appearance has been served, both parties are entitled to one hour in which to appear,

after the time fixed in the said notice. The reported decisions interpreting these statutes are few. In New York it has been held that the provision applies to an adjourned, as well as to the original hearing: *Sherwood v. Saratoga & W. R. R. Co.*, 15 Barb. 650. Unless the hearing is had at the time appointed, or within the hour following, the general rule is, that the delay amounts to a discontinuance, and the justice loses jurisdiction of the case: *Lynsky v. Pendergrast*, 2 E. D. Smith, 43; *Sprague v. Shed*, 9 Johns. 139; *Green v. Angel*, 13 Id. 469; *Flint v. Gault*, 15 Hun, 213. And such result may happen, not only through the non-appearance of the parties, but also by the absence of the justice: *Flint v. Gault*, *supra*. This latter rule, however, is not without exception, and if the delay is occasioned by occupation in other official duties, such as hearing another cause, or attending a town meeting over which it was the justice's duty to preside, it will not be enforced: *Hunt v. Wickwire*, 10 Wend. 102. In this latter case, the hearing was set for one o'clock P. M. The defendant was present at the appointed time and place, and so remained until five o'clock, when, the justice not having appeared, he departed. The justice soon thereafter arrived, having been delayed by attending upon a town meeting, and proceeded to hear the cause, and rendered judgment for the plaintiff. Under this judgment the defendant was arrested, and the commitment was held good. See, also, *Chamberlain v. Lovet*, 12 Johns. 217; *Myer v. Fisher*, 15 Id. 504; *Pickert v. Dexter*, 12 Wend. 150; *Barber v. Parker*, 11 Id. 51; *Stoddard v. Holmes*, 1 Cow. 245.

While it has been established that the justice may, under special circumstances, delay hearing a cause beyond the hour provided by statute, yet the justifiableness of such delay in each case must depend upon its own peculiar facts. The justice has no power, in the face of the express provision of the statute commanding the hearing to take place within the hour, to establish an invariable rule to wait five minutes beyond the hour, on account of the variation of time-pieces: *Wilcox v. Clement*, 4 Denio, 160. "If," as was said by Chief Justice Bronson in this latter case, "the defendant must, at his peril, wait beyond the hour, the statute is, in effect, repealed. When the law says that the plaintiff shall have but one hour, the justice has no right to say he shall have sixty-five minutes. If the plaintiff's watch is five minutes behind the true time, he must keep himself five minutes ahead of his watch." Where, however, upon the expiration of the hour, the defendant requested the justice to call the suit, and the justice, seeing the plaintiff's counsel approaching his office, said he would call the suit the moment he entered the office, but the defendant refused to wait, and upon the plaintiff's counsel attending the court two minutes after the expiration of the hour, judgment was rendered in his favor, the supreme court upheld the judgment on the ground that by availing himself of the momentary omission of the plaintiff to appear, under the circumstances, the defendant had willfully abandoned his defense: *Barber v. Parker*, 11 Wend. 51; *Baldwin v. Carter*, 15 Johns. 495.

In summing up the rules concerning the time for the appearance of parties in justices' courts, Mr. Cowen, in his treatise on justices, sec. 911, says: "In conclusion it may be remarked, that no precise rule can be laid down as to the sufficiency of the reason which may be urged for delaying to call the cause beyond the hour given by statute, or for permitting the defendant to come in and plead after the cause is called, or the trial has commenced. Cases will, and do arise, presenting circumstances so various as to preclude the possibility of establishing a uniform regulation by which justices should be governed. Each case will have its own peculiarities, and the magistrate should endeavor to consult the convenience of parties, at the same time that he avoids doing anything which may tend to the prejudice of either."

ALLEN v. DEMING.

[14 NEW HAMPSHIRE, 133.]

GIVING A PROMISSORY NOTE IS SECULAR BUSINESS, and within the purview of a statute prohibiting such business on Sunday.

PROMISSORY NOTE MADE AND DELIVERED ON SUNDAY IS VOID, and no subsequent acts of the parties can ratify it.

INDORSE OF A PROMISSORY NOTE VOID BECAUSE MADE ON SUNDAY can maintain no action upon it. Whether an action could be maintained if the indorsee had no knowledge of its invalidity, *quære*.

ASSUMPSIT by an indorsee of a promissory note executed and delivered on Sunday in part payment of the purchase price of a lot of shingles sold on that day. The shingles remained with the vendor about a month, when the defendant removed them. Verdict was given for the plaintiff.

Carleton and Wilcox, for the defendant.

Morrison, for the plaintiff.

By Court, GILCHRIST, J. The first section of the act of December 24, 1799, N. H. L. 167, ed. of 1830, provides that no person whatsoever shall do or exercise any labor, business, or work of his secular calling, works of necessity and mercy only excepted, on the Lord's day, under a penalty of six dollars.

If we regard the language of this statute as we examine the phraseology of other laws, its meaning is clear and explicit. If we seek to ascertain the purport and object of the law, apart from all considerations of its policy and expediency, with which this court has nothing to do, its intent seems to be free from all doubt. No plainer or more comprehensive terms could be used, no simpler or more intelligible expressions could be found, than those in which the legislature have clothed their ideas on this subject. Its language and meaning are as plain to ordinary perception as are those of any other law by which certain acts are prohibited under a penalty. But in the judgment of many persons, such a law is impolitic, and ought never to have been enacted, and they easily reach the illogical result, that therefore it should be disregarded by those whose duty it would otherwise be to enforce it, or at least that great astuteness may be properly exercised to defeat its operation. The law is alleged to be difficult in its application and unjust in its effects; to interpose an inequitable defense to an honest demand; to interfere unnecessarily with freedom of opinion and of action; and to give to merely formal observances the high sanction of the law. Some tribunals even have seemed to consider it as a law which had

better be suffered to pass in silence, upon the ground substantially that it had been repealed by public opinion. And the establishment of the principle contended for by the defendant will lead, it is said, to results which no legislature would sanction. But to declare any contract or any class of contracts void, may involve consequences which it would be desirable to obviate. This may be an argument against the expediency, but, except in a very limited sense, not against the binding force of a law. The application of a principle often causes individual hardship, but where the law is plain, it must be declared. Reasoning of this kind can not properly have weight with a tribunal whose duty it is not to make but to expound the law, and which must leave the consequences of that exposition to those who have the constitutional right to determine what laws are required by the public good.

It appears that the ancient Christians "used all days alike for the hearing of causes, not sparing (as it seemeth) the Sunday itself." One reason for this was, that they might not imitate the heathens, who were superstitious about the observance of days; and also, that by keeping their own courts always open, they might prevent Christian suitors from resorting to heathen courts: Spelman's *Original of the Terms*, c. 17; *Swann v. Broome*, 3 Burr. 1598. But the practice ceased with the reason for it, and in the year 516 a canon was made, "*Quod nullus episcopus vel infra positus die dominico causas judicare præsumat.*" This canon, with others of a similar character, was confirmed by William the Conqueror and Henry II., and so became part of the common law of England. But the canons extended no further than to prohibit judicial business on Sundays; for fairs, markets, sports, and pastimes, might still take place on the Sabbath. *Comyns v. Boyer*, Cro. Eliz. 485, decides that a fair held on Sunday is well enough, although by 27 Hen. VI., c. 5, a penalty was inflicted on him who sold on that day. The toleration of amusements and the existence of fairs in England to a greater or less degree upon the Sabbath, are readily accounted for by their known accordance with the practice of Roman Catholic countries, among which was England until the reformation in the reign of Henry VIII. With the spread of the reformed religion, and the consequent improvement in civilization, the views and manners of the people changed on the subject of the rational observance of the Sabbath, and in all Protestant communities laws were enacted to secure it, varying in their provisions with the peculiarities of the people. Pastimes of various

kinds were prohibited by 1 Car. I., c. 1; and by 29 Car. II., c. 7, all persons were prohibited from "doing or exercising any worldly labor, business, or work of their ordinary callings, upon the Lord's day." Under this statute several decisions have been made, principally upon the question whether the contracts which were the subjects of litigation were within the "ordinary calling" of the parties: *Drury v. Defontaine*, 1 Taunt. 131; *Smith v. Sparrow*, 4 Bing. 84; *Blossome v. Williams*, 3 Barn. & Cress. 232; *Fennell v. Ridler*, 5 Id. 406. Wherever the contract was within the ordinary calling of the party, it was held to be void, upon the principle that whatever is forbidden under a penalty can not be the foundation of a valid contract, although the law was once held otherwise: *Drury v. Defontaine*, *supra*. It is difficult to see why this principle should not always have been recognized. A party should not be heard before a tribunal whose duty it is to declare the law, when his cause of action arises from a transgression of the law. The principle has been applied to the sale of lottery tickets: *Hunt v. Krickerbacker*, 5 Johns. 327; to a promissory note for the price of shingles under the statutory dimensions: *Wheeler v. Russell*, 17 Mass. 258; to a sale of wood by the cord, not measured by a wood measurer: *Pray v. Burbank*, 10 N. H. 377; and to many other cases: *Fales v. Mayberry*, 2 Gall. 560; *Law v. Hodson*, 11 East, 300; *Parkin v. Dick*, Id. 502.

In *Geer v. Putnam*, 10 Mass. 312, in the common pleas, to an action of *assumpsit* on a note, the maker pleaded in bar that it was made on the Lord's day, to which the plaintiff demurred generally, and the plea was adjudged insufficient. The counsel for the defendant, on error brought, said, apparently by way of apology, that he made the plea at his client's instance, who had lost a debt in Connecticut on the same ground; but he seemed to think the plea was not to be supported. The chief justice recollected a case in which the court upon deliberation overruled this defense, and the judgment of the court of common pleas was affirmed. This case is the foundation of the doctrine which has since obtained in Massachusetts, that a contract made on Sunday is valid, although the statute of 1791, c. 58, sec. 1, prohibited any manner of labor, business, or work on Sunday, except works of necessity and charity. The case of *Clap v. Smith*, 16 Pick. 247, was decided upon the authority of *Geer v. Putnam*. Should a case arise, however, in which the law of these cases should be inquired into upon principle (an examination which it does not appear thus far to have received), it is not improbable,

judging from the legal learning and ability of that court, that they may be overruled.

The act of W. 3, sec. 1, Prov. L. of N. H. 8, imposed a penalty upon all persons who should "do or exercise any labor, business, or work of their ordinary callings," on the Lord's day, following the language of 29 Car. II. The act of February 2, 1789, N. H. L. 291, ed. of 1797, is like the above, excepting that the word secular is substituted for the word ordinary, and it is also used in the act of December 24, 1799, the law now in force. We have no reported case in which the validity of a contract made on Sunday has been inquired into. It is to be inferred, from the language of the court in the case of *Frost v. Hull*, 4 N. H. 157, that such a contract would be invalid; but that was not the question before the court. And the case of *Shaw v. Dodge*, 5 Id. 462, decides that the service of civil process on that day can not be justified. In *Clough v. Davis*, 9 Id. 500, although it is said that the prevailing opinion seems to be that in this state all secular contracts made on the Sabbath are void, the point whether a note made on that day is void, is left undecided, as not being before the court. The question therefore in the present case may be regarded as an open one. In relation to it, however, we entertain no doubt. The word "secular" means "temporal, pertaining to temporal things, things of this world, worldly; also, opposed to spiritual, holy;" Richardson's Eng. Dictionary. The giving a note certainly pertains to things of this world, and is a matter of secular business. The most latitudinarian would scarcely consider it as having a spiritual character.

It is alleged that, even if the transaction were a matter of secular business, and so prohibited by the statute, it became valid by the subsequent acts of the defendant. But the contract was made on Sunday, and the note was executed and delivered on Sunday. The shingles remained at the plaintiff's house, it is true, but they remained there, not that the contract for their sale was incomplete until their removal, or was so considered, but merely as it would seem for the convenience of the defendant. Nothing remained to be done on the part of the seller, to vest the property in the purchaser. The contract, then, having been made on Sunday, was void, and therefore incapable of being ratified. Thus marriage brokerage contracts are void, as against public policy, and incapable of confirmation: 1 Fonbl. Eq., b. 1, c. 4, sec. 10 (N. S.); *Roberts v. Roberts*, 3 P. Wms. 66; 1 Story on Eq., secs. 306, 345. The general rule

as, that whenever any contract or conveyance is void, either by positive law or upon principles of public policy, it is deemed incapable of confirmation. It can not operate on an estate which is void at law: Co. Lit. 295, b. And if it be of a void thing, it avails nothing, nor can it make good a void lease: Com. Dig., Confirmation, (D 1). In *Smith v. Sparrow*, 4 Bing. 84, Best, C. J., says: "I do not say that the mere inception of a contract on a Sunday will avoid it, if completed the next day, but if most of the terms are settled on Sunday, and the mere signature be deferred till the next day, such a contract could scarcely be supported." And Gaselee, J., remarks, "That the plaintiff's subsequent assent was an assent to the contract made on the Sunday, and there is no evidence to show that there was any subsequent contract. Here the whole contract was completed on the Sunday; so that it is unnecessary to enter into any nice distinctions, or to decide whether a contract would be binding if all the terms of it were agreed on Sunday, and a writing containing them signed the first thing on Monday morning."

It has been argued at the bar, that *Clough v. Davis* is a case of ratification of a contract made on Sunday. But there the note was written on Sunday, and given to an agent, with authority to deliver it on Monday. No contract was completed on Sunday, but something remained to be done. The attempt to confer an authority on Sunday was ineffectual. It was the simple case of a person assuming to act as agent for another without authority. But the note came into the hands of the payee, whether with or without an original authority was immaterial, for while it was there the defendant promised to pay it, and thus made a new contract.

But it is said the plaintiff is an indorsee, and that the note is not void in his hands. In *Drury v. Defontaine*, 1 Taunt. 131, a contract made on Sunday was said to be void. In *Bloxsome v. Williams*, 3 Barn. & Cress. 232, the disability to sue upon such a contract is confined to those who become parties to it with the knowledge that it is illegal. In *Fennell v. Ridler*, 5 Id. 406, it is held that it would not be void so as to defeat a claim by an innocent party, and that such must have been the meaning of the court in *Drury v. Defontaine*. But this case finds merely that the plaintiff is an indorsee. He is not necessarily, nor is there any presumption that he is, innocent of all knowledge of the original illegality of the contract. If any further facts appeared on the trial than are presented by the case, it may perhaps be amended in such a way as to present other questions.

And perhaps, as the defendant took the shingles into his possession subsequent to the Sabbath, he may be made liable for their value upon a *quantum meruit*, upon the authority of the case of *Williams v. Paul*, 6 Bing. 653. But the plaintiff can not maintain his suit, if it have no other foundation than the contract made on Sunday, and upon the present facts he is not entitled to recover.

Verdict set aside.

CONTRACTS MADE ON SUNDAY, WHEN VOID: See prior cases in this series collected in the note to *O'Donnell v. Sweeney*, 39 Am. Dec. 336.

THE PRINCIPAL CASE IS A LEADING AUTHORITY on the effects of contracts made on Sunday, and is cited and affirmed in the following cases: *Pettit v. Pettit*, 32 Ala. 308; *Boutelle v. Melendy*, 19 N. H. 197, to the effect that a void contract is incapable of ratification; and in *Tucker v. West*, 29 Ark. 393; *Hill v. Wilber*, 41 Ga. 453; *Sayre v. Wheeler*, 31 Iowa, 114; *Reynolds v. Stevenson*, 4 Ind. 620; *Love v. Wells*, 25 Id. 506; *Cumberland Bank v. Mayberry*, 48 Me. 440; *Oranson v. Goss*, 107 Mass. 440; *Varney v. French*, 19 N. H. 235; *State Capital Bank v. Thompson*, 42 Id. 370; *George v. George*, 47 Id. 30; *Reeves v. Butcher*, 31 N. J. 226; *Raines v. Watson*, 2 W. Va. 393, to the effect that a promissory note given on Sunday, is void, because giving the same is secular business.

PROPRIETORS OF THE UPPER LOCKS *v.* ABBOTT.

[14 NEW HAMPSHIRE, 187.]

PROMISE MADE FOR THE BENEFIT OF ANOTHER need not necessarily be in writing.

AGREEMENT TO PAY TOLL ON CERTAIN LUMBER of a third party, if the plaintiff would allow the same to pass through his canal locks, is an original undertaking and need not be in writing.

ASSUMPSIT, to recover the amount of toll due on account of the passage of lumber of one Sanborn through plaintiffs' canal. The further facts appear in the opinion.

Ainsworth and Bellows, for the defendant.

Perley, for the plaintiffs.

By Court, GILCHRIST, J. If the defendant's promise had been a collateral undertaking, in the circumstances of this case, it must have been in writing. The principle established by the cases is, that if any credit is given to the party who receives the benefit, the undertaking of the other is collateral, and voidable unless in writing: *Holmes v. Knight*, 10 N. H. 177, and cases there cited. Whether this principle has not been sometimes so applied as to transform the collateral liability into a principal

liability, as it is intimated in that case may have been done, need not be now inquired into, because it is the opinion of the court that the promise by the defendant was clearly an original undertaking.

Sanborn had caused the lumber to enter the head of the canal. At this place the tolls are usually exacted for the passage through the locks. At this point, then, Sanborn had incurred no liability. He had his choice, either to pay the tolls, that the lumber might pass through the locks, or to withdraw the lumber from the canal. The lumber was not to be stopped at this place if the tolls were not paid, but in that event its stoppage would take place at the locks at the foot of the canal. In this emergency, application was made to Abbott, and he thereupon promised the agent that if he would permit Sanborn to pass the lumber through the locks, he, Abbott, would be responsible for the tolls. This was not a promise to be answerable for Sanborn's debt, nor a promise to pay the tolls if Sanborn did not pay them, but a new and distinct contract, to which there were no parties but the agent and Abbott. The case is likened by the defendant to that of a traveler on a turnpike road, who is bound to pay his toll when he reaches the gate. But he is not bound to pay any toll if he does not pass through the gate. He may choose to turn back, and in that event he would be under no liability to pay toll for traveling over the road. Such was the position of Sanborn. He incurred no liability by causing the lumber to enter the head of the canal. It was its passage through the locks, and that alone, from which the liability arose. So far was the agent from making any contract with Sanborn, or from giving any credit to him, that he refused to do so.

In this case, the promise by Abbott may be considered as made for the benefit of Sanborn. But this fact alone does not render it necessary that the promise should be in writing. In *Darnell v. Pratt*, 2 Car. & P. 82, a mother took her son to school, and saw the master, but it did not appear what passed between them. Afterwards, a bill was delivered to the boy's uncle, who said it was quite right, for he was answerable. It was held that the statute of frauds did not apply, and that there was competent evidence of an original undertaking by the defendant, the uncle. So a promise by a surety to indemnify the plaintiff if he also would become surety for the principal, is not within the statute: *Chapin v. Merrill*, 4 Wend. 657. In *Chapin v. Lapham*, 20 Pick. 467, the defendant promised to indemnify the plaintiff

if he would assist the defendant's son in his business. The plaintiff accordingly signed a note as surety, with the son as principal, which he afterwards paid, and it was held that the promise was not within the statute. The opinion of the court is, that there should be

Judgment on the verdict. —

PROMISE MADE FOR THE BENEFIT OF ANOTHER, when need not be in writing: See *Anderson v. Davis*, 31 Am. Dec. 612, and prior cases in this series cited in note thereto; *Nelson v. Boynton*, 37 Id. 148, and cases cited in note.

TICKNOR v. HARRIS.

[14 NEW HAMPSHIRE, 272.]

ALL PROPERTY, REAL AND PERSONAL, OF A DEBTOR, IS LIABLE, both during his life-time and afterwards, for the payment of his debts, which liability is to be made effectual by special provisions of the law for that purpose.

PROPERTY OF A DEBTOR CAN NOT BE APPLIED TO THE PAYMENT OF A DEBT, when the remedy thereon is barred by statute.

ADMINISTRATION OF AN ESTATE AS INSOLVENT IS GOOD, although the same afterwards turns out to be solvent.

CREDITOR WHOSE CLAIM DEPENDS UPON A CONTINGENCY, which has not happened during the pendency of the settlement of an insolvent estate, is not barred by failing to present such claim to the commissioner for allowance.

EXECUTOR OR ADMINISTRATOR, AT COMMON LAW, could not sell the real estate of the deceased for the payment of his debts unless expressly charged for that purpose. Such real estate descended to the heir of the deceased.

OBLIGEE IN A BOND EXECUTED BY THE DECEASED, binding on himself and his heirs, might, at common law, sue either the heir or executor at his election, and have execution against the lands of the deceased, unless the same had been specifically devised, or the heir had aliened them prior to action brought.

REMEDY TO CREDITORS BY BOND AND SPECIALTY, IN AN ACTION OF DEBT, against the devisee and the heir who had aliened, was given by the statute of 3 and 4 Wm. and Mary, c. 14, which remedy was extended to the colonies by the third section of the act of 5 Geo. II., and may be considered as part of our common law.

SUCH STATUTE DID NOT PROVIDE FOR THE MAINTENANCE of an action at law by the creditor of an estate against a legatee, to recover his debt, and consequently no such action can be sustained.

LEGACIES ARE REACHED, FOR THE PAYMENT OF DEBTS, through the executor or administrator, by the latter's retaining the same until the debts are paid.

LEGATEES WHO HAVE BEEN PAID THEIR LEGACIES are bound to refund a ratable part thereof, if debts are presented to the executor or administrator, more than sufficient to exhaust the residuum after such legacies have been paid.

REMEDY AGAINST THE LEGATEES IS CUT OFF by failing to present the claim to the commissioner within the time limited by statute, notwithstanding such claim depends upon a contingency which has not happened.

ACTION OF DEBT ON A CLAIM AGAINST A DECEASED DEBTOR should not be brought against the heirs and devisees jointly, if the heirs take nothing by descent.

WHETHER A CREDITOR, WHOSE CLAIM DEPENDED UPON A CONTINGENCY, can in any case come into equity to enforce payment against legatees who have received their legacies, *quære*.

COVENANT against the heirs, devisees, and legatees of one John Harris, upon a written obligation, by which the latter bound himself upon the happening of a certain contingency. Harris died on March 31, 1839, and his estate was administered upon as insolvent. It afterwards turned out that the estate was solvent, and on the first Tuesday of May, 1841, the balance was distributed to the legatees. The devisees had already received the estate devised to them. After the settlement of the estate, the contingency happened upon which Harris became liable. Plaintiff had never presented his claim to the commissioner. The defendants demurred to the declaration. The further facts appear in the opinion.

Duncan, for the plaintiff.

T. Leland, for the defendants.

By Court, PARKER, C. J. The plaintiffs rely upon the statute of July 2, 1822, providing that the estate of every person dying testate shall stand chargeable, among other things, with the just debts which he owed, in the same manner in which intestate estates are charged: 1 N. H. L. 357. Another statute of the same date, relative to the descent and distribution of intestate estates, enacts that they shall stand chargeable with the just expenses of the administration, etc., the just debts which the deceased owed, and with the support of the infant children until they arrive at the age of seven years, and that the residue of the personal estate, if any, shall be distributed to the widow and heirs, etc.: Id. 353.

It is a general principle pervading our legislation that the estate of an individual, real and personal, with certain exceptions in the case of poor debtors, is liable for the payment of his debts. It applies as well during the life-time of the debtor as afterwards, but in both cases it is to be made effectual by the force of other special provisions of the law for that purpose. If a debt may be said to exist when the remedy is barred by statute, the property of the debtor can not be applied to the payment of

it, whether the statute be applicable to the estate of a living debtor, or that of one who has deceased. In *Wilkinson v. Leland*, 2 Pet. 658, cited for the plaintiff, it said that the title to lands which vests in the heir and devisee, is "incumbered with all the liens created by the party in his life-time, or by the law at his decease;" that "it is not an unqualified although it be a vested interest," and that "it confers no title except to what remains after every such lien is discharged." It is stated in the same opinion that "the laws of Rhode Island in all cases make the real estate of persons deceased chargeable with their debts, whether inhabitants or not;" but it is further said: "If the authority to enforce such a charge by sale be not confided to any subordinate court, it must, if at all, be exercised by the legislature itself." *Wilkinson v. Leland*, 2 Pet. 660.

The general provision of the law making estates liable to the payment of debts, was inserted on account of different rules having prevailed at common law; and we must look to the particular statutes for our authority to administer this general principle, and for the manner in which it is to be made effectual. The estate of John Harris was administered as an insolvent estate, and this was a legal mode of administration, notwithstanding it proved to be solvent. By the provisions of the act regulating the settlement and distribution of insolvent estates, all demands which the deceased owed at his death, whether payable or not at the time, might be presented and allowed by the commissioner appointed for the purpose, and paid through the intervention of the administrator by a sale of the property of the deceased.

There are provisions for an objection by the executor or administrator, and for an appeal from the decision of the commissioners by the creditor, and for the prosecution of suits in such cases against the executor or administrator. The seventh section provides that all claims exhibited, rejected, and not prosecuted, and all demands which might have been exhibited, but were not, shall be forever barred, and that no action against any executor or administrator of any such estate shall ever be sustained otherwise than in this act is provided. There is then a proviso, "that nothing herein contained shall be construed to impair any remedy of a creditor against the heirs or devisees of any such estate, whose demand could not be allowed by the commissioners, because the same depended upon a contingency which had not happened before or during the time allowed to the creditors to prove their demands:" 1 N. H. L. 364.

The claim of the plaintiff depended upon a contingency which

had not happened at the expiration of the commission. He is, therefore, within the saving of this proviso, if he has by any other law a remedy; and the question is, what remedy he has against the heirs or devisee of the estate. We have no statute upon this subject. By the common law the executor was to collect and convert the personal estate into money, and pay the debts according to their priority; but lands, unless expressly made chargeable, or assets, descended upon the decease to the heir, unless devised. In the latter case the devisee became entitled to them.

The executor or administrator could not sell the lands for payment of debts, unless expressly charged for that purpose. When, however, the ancestor bound himself and his heirs in an obligation, the obligee might sue the heir or executor at his election, and have execution of the land descended to the heir. But if the heir, before an action brought against him, had aliened the assets, the obligee was without remedy; and if the ancestor had devised the lands, the creditor by the common law could not reach them in the hands of the devisee, and had no remedy against heir or devisee.

To remedy the evils arising from this state of the law, the statute of the 3 and 4 Wm. and Mary, c. 14, made provision that where the heir had aliened, he should be liable to such debts to the value of the land descended, in an action of debt; and the same statute, reciting that several persons had by bonds or other specialties bound themselves and their heirs, and had afterwards by will disposed of their lands to defraud their creditors, enacted that such dispositions should be deemed and taken only as against such creditor or creditors as aforesaid, his heirs and their heirs, etc., to be fraudulent and void. And that such creditors might be enabled to recover their said debts, enacted that, in the cases before mentioned, "every such creditor shall and may have and maintain his, her, and their action and actions of debt upon his, her, and their said bonds and specialties, against the heir and heirs at law of such obligor or obligors, and such devisee and devisees, jointly by virtue of this act," and that the devisee should be liable for a false plea, in the same manner as the heir: *Bac. Abr., Heirs, etc., F, vol. 3, pp. 26, 27; Hays v. Jackson, 6 Mass. 151.* By this statute the heir who had aliened was liable in an action of debt, and the devisee also in an action of debt. No provision is made by it for maintaining any other action.

It is very clear that, by this statute, devisees as well as heirs

were liable to the suit of creditors by bond and specialty only. And in the argument of *Judge of Probate v. Brooks*, 5 N. H. 84, I suggested that as a reason why the statute could never have been adopted here, being contrary to the policy of our laws, which give no preference to creditors by specialty. The court, however, held otherwise, and if that statute were not adopted there would seem to be no remedy against a devisee here. And I am of opinion, upon further consideration, that the remedy is extended to all creditors here by the third section of the act of 5 Geo. II., "for the more easy recovery of debts in his majesty's plantations and colonies in America;" which enacts that after the twenty-ninth of September, 1732, the houses, lands, negroes, and other hereditaments and real estates, situate and being within any of the said plantations, belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands, of what nature or kind soever, etc., and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process, etc.: See N. H. Prov. L. 235.

This statute having been made expressly for the colonies, is adopted by our constitution as one of the laws which had been used and practiced on here, and may be considered as part of our common law, being in amendment of it. By the operation of this colonial statute, then, and by the proviso in the statute relative to estates administered in the insolvent course, any creditor whose demand depended upon a contingency, so that it could not be allowed by the commissioner, has a remedy here by the common law against the heir; and, by the statute 3 and 4 Wm. and Mary, a further remedy against the heir and the devisee. This action includes two devisees, and against them we see no reason why it may not well be maintained. But it includes also others, who are children of John Harris, and who, it is averred in the declaration, have legacies by his will.

The plaintiff's counsel argue that it may be supported against them, by the force of the term devisees in the exception, because that term is used to include those who have personal estate by the will, as well as those who have real estate. There is no doubt that the terms legatee and devisee are sometimes used as synonymous. The former is perhaps more often used as including the latter. It is so used in the clause of the statute cited by the plaintiff's counsel, providing that where there is no heir

or legatee of any estate of a person deceased, the same shall accrue to the state: 1 N. H. L. 352. But the term devisees, in the proviso of the statute for the settlement of insolvent estates, can not be considered as including legatees of personal estate, because such construction would be useless. The proviso is, that the act shall not impair the remedy of creditors, whose demands depend on a contingency against the heir or devisees. It gives no new rights, and creditors had no right of action against legatees before its passage, which the act could impair. There is no provision by the common law, or by any English statutes in amendment of it before the revolution, or by our statutes, for the maintenance of an action at law by a creditor of an estate against a legatee, to recover his debt.

It is the duty of the executor or administrator first to discharge all the debts, and when they are paid he is to pay the legacies. If there is not sufficient to pay both, the legacies abate to the extent of the deficiency; and "if the legatees have been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in more than sufficient to exhaust the residuum after the legacies paid:" See 2 Bl. Com. 513. The legacies are reached, for the payment of debts, through the executor or administrator, by retaining until the debts are paid, or if more come in afterwards, by recalling sufficient.

Our statute, respecting the settlement of insolvent estates, has cut off this remedy, so far as contingent demands which could not be allowed by the commissioner are concerned, by its provision that no suit shall be sustained against the executor or administrator otherwise than as is provided in that act: *Judge of Probate v. Brooks*, 5 N. H. 82. As no judgment can be had against him, he has no occasion to recall anything from the legatees to answer such demands, and the statute, in taking away this remedy through the administrator, has provided no other by which the legatees are made liable. This is otherwise in Massachusetts: See *Wood v. Leland*, 22 Pick. 505; S. C., 1 Metc. 387. Our statute, by saving the remedy against the heirs and devisees, makes the real estate chargeable in their hands, but it goes no further. We have found no case where a legatee was held to contribute to an heir. Probably none is to be found, as in all but insolvent estates it is the duty of the administrator to pay, and he may recall the legacies for the purpose. If a legatee were bound to contribute, or to pay the heir or devisee, that would not give the creditor a direct remedy against the legatee.

There is, perhaps, good reason why creditors should not have

a direct remedy against legatees, as many legacies are very small, and more evil might result from authorizing suits directly against them, than accrue from the present state of the law upon this subject. No way seems to be provided for a creditor to reach a distributive share of the personal estate in the hands of the heirs, where the suit against the administrator is taken away: See *Howes v. Bigelow*, 13 Mass. 390. Perhaps the statute should be amended, so that, in case of estates actually solvent, a remedy should remain against the executor or administrator upon demands which could not be allowed by the commissioner.

Another question in the case is, whether the action should be brought against the heirs and devisees jointly, although the heirs take nothing by descent. The statute says the creditor may maintain his action against the heirs and devisees jointly. Some of the cases in equity would, on a first inspection, seem to hold that it is necessary to bring a joint bill or action against the heirs at law and devisees, although the heir have nothing: *Gawler v. Wade*, 1 P. Wms. 99; *Warren v. Stawell*, 2 Atk. 125; 1 Chit. Pl. 40. But we do not see the necessity of it, when it clearly can not be maintained against the heir; and if the heir have nothing, he may plead *riens per descent*: See 2 Tidd's Pr. 855. By heirs must have been intended those who actually inherited; for, being an action *ex contractu*, if not maintained against all those sued, the plaintiff could not have had judgment against any of the defendants until the passage of a statute within a few years past: *Livingston's Ex'rs v. Tremper*, 11 Johns. 102; *Jeffreson v. Morton*, 2 Saund. 7, note 4.

There is a case, *Booth v. Starr*, 5 Day, 419 [5 Am. Dec. 149], where a grantee in a deed, the covenant of warranty having been broken after the settlement of the estate of the grantor in the insolvent course, reached the surplus estate in the hands of the guardian or trustee of the heir, by a bill in chancery. But we need not consider, at this time, whether a creditor of an estate represented insolvent, whose demand depended upon a contingency, and could not therefore be allowed, can in any case come into equity to enforce payment against legatees who have received their legacies. In the case in Connecticut, the rights of legatees were not in question; the estate was held in trust by a guardian of the heir; and there was no remedy at law against any devisee.

Upon the case now before us, the defendants are entitled to judgment upon the demurrer. But the plaintiff may, perhaps, have leave to amend, by discontinuing against all the defendants except the two who take the real estate as devisees.

CONTINGENT CLAIM AGAINST ESTATE OF DECEASED DEBTOR, when need not be presented for allowance: See *Jones v. Cooper*, 16 Am. Dec. 678.

LIABILITY OF PROPERTY IN HANDS OF HEIRS, devisees, or alienees, to payment of decedent's debts: See *Adams v. Holcombe*, 14 Am. Dec. 719; *Campbell's Case*, 20 Id. 360; *Bruch v. Lanta*, 21 Id. 458; *Morris v. Mowatt*, 22 Id. 661; *Robards v. Wortham*, Id. 738; *Chase v. Lockerman*, 35 Id. 277.

KENNISTON v. MER. CO. MUT. INS. CO.

[14 NEW HAMPSHIRE, 341.]

DAMAGE BY LIGHTNING WITHOUT ANY COMBUSTION is not within the terms of a policy of insurance providing against losses by fire.

ASSUMPSIT on a policy of insurance providing against losses by fire. It appeared that the loss complained of was caused by lightning. Whether such lightning caused any fire, was not determined. The lower court gave judgment for the plaintiff.

By Court, PARKER, C. J. There must be a new trial. On the facts stated, the court can not determine whether the loss is, or is not, within the risks of the policy. If the damage was from lightning without any combustion, it is clearly not within the terms of the contract of insurance. The policy does not provide against every damage which may arise from the action of the electric fluid. The charter of the insurance company indeed refers to lightning, but it is only to authorize the defendant to insure against losses by fire, which "shall happen by lightning." This is a very different thing from direct losses by lightning, both as regards their origin, nature, predisposing causes, development, and effects, and in reference to the possible application of means to prevent and to limit the damage.

The terms of the policy, too, were to pay within a certain time after the destruction "by reason or by means of fire." Fire is the one loss insured against; and lightning, though not excepted from the sources of fire, is nowhere, either in the charter or policy itself, directly provided against. It is true, that there was evidence tending to show that the building, insured in the policy now in question, was set on fire by the lightning; and if such was the fact, this action is well brought. But this fact is not made certain by the evidence, and the question must be submitted to a jury.

New trial ordered.

LOSS BY FIRE, WHAT IS: See *City Fire Ins. Co. v. Corlies*, 34 Am. Dec. 258, and note. The principal case is cited in *Scripture v. Lovell etc. Ins. Co.*, 10 Cush. 360, to the effect that damages occurring by lightning are not embraced within a policy of insurance against loss by fire.

TENNEY v. EVANS.

[14 NEW HAMPSHIRE, 243.]

PARTY TO THE RECORD CAN NOT BE COMPELLED, against his consent, to become a witness.

DECLARATIONS OF A PARTY TO THE RECORD ARE ADMISSIBLE, if against his interest, although he appear to be only trustee for a third person.

DECLARATIONS OF A GUARDIAN CONCERNING THE OWNERSHIP of property purchased by him, made at the time of such purchase, are admissible in evidence as part of the *res gesta*.

PERSONAL PROPERTY ON THE LAND OF A WARD, purchased and placed there by his guardian, must, *prima facie*, be considered as the ward's. Such presumption may be overcome by evidence, and to that end the declarations of the guardian, as indicating his intention, may be given in evidence.

GUARDIAN MAY PURCHASE PROPERTY FOR HIS WARD, which will belong to him, if on attiving at age he accept the property and ratify the transaction.

GUARDIAN CAN NOT PURCHASE PROPERTY AND PLACE IT ON THE LAND of his ward, to the injury of his creditors.

TROVER against a sheriff for some cattle and farming tools, attached by him as the property of David Tenney. The action was originally commenced by David Tenney, as guardian of the plaintiff, but after the latter's coming of age, was continued by him. It appeared that the property was purchased by the guardian, and placed upon his ward's farm. Plaintiff contended that the property was purchased for him, to rebut which the defendant gave evidence, against the plaintiff's objection, of declarations of his guardian made at the time of such purchase and subsequently. Verdict was given for the defendant. The further facts appear in the opinion.

Ainsworth, for the plaintiff.

Pierce, for the defendant.

By Court, GILCHRIST, J. The first question in this case arises upon the admission of the acts and declarations of the guardian in relation to the property. The case finds, that in order to prove that the guardian owned the property, evidence was received of his acts and declarations at the times when he purchased it, and at other times before the attachment, tending to show the fraudulent character of the transactions. This evidence is of two descriptions. That part of it which relates to the guardian's declarations at other times than those when he bought the property, must be considered in reference to the guardian's position as a party to the record, for it is on that ground only that it is admissible.

The plaintiff contends that the guardian was competent to testify, and therefore his declarations could not have been given in evidence. It is stated in the case of *Ross v. Knight*, 4 N. H. 238, that the declarations of a person relating to a fact, who might have been called as a witness, are inadmissible. The cases cited in the argument for the plaintiff merely recognize the principle stated in *Ross v. Knight*. But it is necessary to go somewhat further than this, and to establish the position that the defendant might have compelled the guardian to testify, in order to exclude the evidence of his declarations. But the plaintiff's position is not without authority to support it. *Cowling v. Ely*, 2 Stark. N. P. 366, a minor brought a suit by his guardian, and a witness was offered by the defendant to prove declarations made by the guardian, the defendant contending that they were competent, because the guardian was liable for the costs. But Abbott, J., was clear that they were not admissible against the plaintiff. The report of the case does not show on what ground the ruling was made. But in *James v. Hatfield*, Stra. 548, Lord Chief Justice King allowed the defendant to give in evidence the declarations of the plaintiff's guardian, on the ground that the guardian was liable for costs. It is said, in 1 Ph. & Am. Ev. 47, note 1, that much confusion has arisen from inattention to the distinction between the privilege of parties to a suit, and their incapacity in common with other interested witnesses. That a party to the record should not be compelled against his consent to become a witness in a court of law, is a rule founded in good sense and sound policy. It forms the point of the decision in the case of *The King v. Woburn*, 10 East, 395, per Tindal, C. J.; in *Worrall v. Jones*, 7 Bing. 395; *Mauran v. Lamb*, 7 Cow. 174. The rule is said not to be founded exclusively on the ground of interest, but on that also of public policy: *Commonwealth v. Marsh*, 10 Pick. 57. And it is recognized in *Plattekill v. New Paltz*, 15 Johns. 305, and in *Frear v. Evertson*, 20 Id. 142. So in an action of ejectment on the several demises of two lessors, one of them is not compellable to give evidence for the defendant, though no title has been proved under his demise: *Fenn v. Granger*, 3 Camp. 178. The lessors of the plaintiff, said Lord Ellenborough, are substantially the parties on the record. All are jointly liable; that lessor upon whose title the recovery proceeds is generally the trustee of the other; and there are the same reasons for protecting them from being examined, which have produced the general rule of law, that the parties on the record can not be

compelled to give evidence against themselves, and are not permitted to swear in their own favor: *Mayor of Colchester v. —*, 1 P. Wms. 595; *Chenango v. Birdsall*, 4 Wend. 453; *Commonwealth v. Marsh*, 10 Pick. 57; *Columbia Man. Co. v. Dutch*, 13 Id. 125; *Page v. Page*, 15 Id. 368. An administrator defendant can not testify in a cause, because he is liable in the first instance for the costs: *Fox v. Whitney*, 16 Mass. 118. If the guardian, then, could have been compelled to testify, the reason for rejecting his declarations does not exist.

But the rule is, that the declarations of a party to the record, against his interest, are admissible: *Spargo v. Brown*, 9 Barn. & Cress. 935. The leading case on the subject is *Bauerman v. Badenius*, 7 T. R. 663, which decides that the declarations of the plaintiff on record are admissible, although he appear to be only a trustee for a third person. Lord Kenyon said it would never have occurred to Sir M. Hale, or Lords Holt or Hardwicke, sitting in a court of law, that they could have gone out of the record and considered third persons as parties in the cause, and that it was "an incontrovertible rule that an admission made by the plaintiff on record is admissible evidence." This decision was followed by the case of *Gibson v. Winter*, 5 Barn. & Adol. 96, where it was held that a trustee suing as plaintiff in a court of law must be treated in all respects as a party in the cause. In that case, a broker in whose name a policy of insurance was effected upon the property of another, brought an action upon it. The defendants pleaded payment to the plaintiff, and it was held that although there was no payment, as between the assured and the assurers, it was a good payment as between the plaintiff on record and the defendants, and therefore was an answer to the action. Several other cases warranting the decision are cited by Denman, C. J., in delivering the judgment of the court. And our opinion is that the declarations of the guardian in this case were legally competent as the admissions of a party to the record.

The other declarations of the guardian accompanied the purchase of the property. In addition, therefore, to their having been made by a party to the record, they may be examined in relation to their constituting a part of the *res gestæ*. The circumstances surrounding the principal fact may always be shown to the jury, if they are so connected with it as to illustrate its character; but it is impossible to lay down any precise general rule, pointing out the cases in which declarations are admissible as part of the *res gestæ*, and those where they must be rejected as

the mere assertions of the party: *Pool v. Bridges*, 4 Pick. 378; *Allen v. Duncan*, 11 Id. 308. In this case the declarations had a peculiar pertinency, from the transaction which they accompanied. The question in controversy was, to whom the property on the farm belonged. The ward now alleges it was his. But when it was placed there, the guardian had the control over it; and whether it belonged to him or to his ward, in managing it he exercised no more than a legal authority. It was the property of one or the other of them, and on the question of ownership nothing would be more likely to throw light, than the declarations of the person who was actually exercising the control of it: *Blake v. White*, 13 N. H. 267.

Personal property on the land of the ward, purchased and placed there by the guardian, must, *prima facie*, in the absence of evidence to the contrary, be considered as the ward's: *Tenney v. Evans*, 11 N. H. 346. But on its being shown that the guardian had no other property of the ward than the proceeds of the land, the question of ownership was somewhat less clear. The act of purchase might then be considered as somewhat equivocal, and its effect would depend on the intention or disposition from which it proceeded; and this would best be denoted by the expressions accompanying it. Whether the guardian purchased the property with his own money, or with that of his ward, was a subject of inquiry. Now, whenever the conduct of a person at a given time becomes the subject of inquiry, his expressions, as constituting a part of that conduct, and indicating his intention, can not properly be rejected as irrelevant. In questions of fraud, or *bona fides*, where the intent with which an act is done, is generally so important, it is difficult to form a correct judgment unless a view is had of the whole transaction, of course including the conversation which forms a part of it. When a man does an act, the presumption is, that his contemporary declaration accords with his real opinion and intention: *Hadley v. Carter*, 8 Id. 40. In that case the question was, whether a servant was enticed from the employ of the plaintiff; and it was held that his declaration, made at the time he left the plaintiff's service, and showing that he went away of his own accord and for reasons of his own, was admissible. And whenever evidence of an act done by a party is admissible, his declarations, made at the time, and having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible: *Sessions v. Little*, 9 Id. 271. These remarks apply to the declarations of the guardian, made

at the times of the purchases. They were competent, as part of the *res gestæ*. The other declarations, tending to show the fraudulent character of the transaction, seem to be mere narration, and not a part of the *res gestæ*, as they did not accompany any act, and are competent evidence, as admissions made by a party to the record.

As to the other point in the case, there is no doubt that a guardian may purchase property for his ward; and if the latter, on coming of age, accept the property and ratify the transaction, the property will belong to him. But a guardian can not purchase property and place it on the land of his ward, or anywhere else, to the injury of his creditors. In general, he can not by his contract bind the person or estate of his ward: *Jones v. Brewer*, 1 Pick. 317. But sales made by persons of full age to infants are voidable only by the infant. They could not be avoided by the guardian; at any rate, where they were made by his assent: *Oliver v. Houdlet*, 13 Mass. 238 [7 Am. Dec. 134]; *Barnaby v. Barnaby*, 1 Pick. 221. In this case the property did not change its owner by being placed on the ward's land. Nor could the ward make it his while he was under age. It remained the guardian's until the ward became of age and ratified the purchase, whatever might have been the dealings between the guardian and the sellers, or whatever shape their contracts assumed. We think, therefore, that the instructions of the court were correct.

Judgment on the verdict.

DECLARATIONS, WHEN ADMISSIBLE IN EVIDENCE as part of the *res gestæ*: See *Ross v. Bank of Burlington*, 15 Am. Dec. 664; *Evans v. Smith*, 17 Id. 74; *Gorham v. Canton*, Id. 231; *Kimball v. Huntington*, 25 Id. 590; *Deming v. Carrington*, 30 Id. 591. When because against interest: See *Myers v. Brownell*, 16 Id. 729; *Hyde v. Stone*, 22 Id. 582; *Richardson v. Richardson*, 30 Id. 538, and note. Admissions of a party to the record are always evidence, although he be but a trustee for another: *Davis v. Calvert*, 25 Id. 282.

SANFORD MFG. CO. v. WIGGIN.

[14 NEW HAMPSHIRE, 441.]

REFLEVIN CAN NOT BE MAINTAINED unless the plaintiff have, at the time of the taking, either the general or special property in the goods.

GENERAL ISSUE IN AN ACTION OF REPLEVIN is simply a denial of the taking, and admits the plaintiff's property in the thing taken.

CREDITORS, IN ORDER TO ATTACK A SALE ON THE GROUND OF FRAUD, must prove their debts.

SHERIFF WHO SEIZES GOODS IN THE POSSESSION OF A THIRD PARTY, on a writ against the vendor, on the ground that the sale of such goods was fraudulent, must, in order to protect himself, prove the existence of a debt in favor of the attaching creditor. Simply proving that the writ was issued in a pending suit upon a promissory note is not enough.

GRANTING A NEW TRIAL ON THE GROUND OF SURPRISE is discretionary in the court below. The exercise of such discretion is not reviewable on appeal.

MISTAKE AS TO THE LEGAL EFFECT OF EVIDENCE is not such surprise as warrants a new trial.

REFUSAL TO ALLOW NEW TESTIMONY TO BE PUT IN after the case has been closed and the jury instructed is not ground for a new trial.

REPLEVIN for thirteen bales of cotton. The defendant pleaded the general issue, and set up title in the property in one Hayden, and that the same was seized by defendant as deputy sheriff by virtue of a writ of attachment against Hayden. Plaintiffs admitted all these facts except the first, and set up title to the goods in themselves by sale from Hayden. Upon the trial defendant attacked the sale of the goods from Hayden to the plaintiff on the ground of fraud, but offered no evidence of the debt under which he proposed to justify his taking. Verdict was given for the plaintiff. The further facts appear in the opinion.

Wiggin, for the defendant.

N. A. Wells and Christie, for the plaintiff.

By Court, GILCHRIST, J. To support the action of replevin, the plaintiff must have had at the time of the caption, either the general property in the goods taken, or a special property therein. In this respect it is like the action of trover. If the plaintiff has not the immediate right of possession, replevin can not be supported, but the party must proceed by an action on the case: 1 Chit. Pl. 187, 188. The defendant pleaded the general issue, *non cepit modo et forma*. This plea puts in issue not only the taking, but also the taking in the place mentioned in the declaration: 1 Chit. Pl. 537. And the plaintiff will fail, unless he prove the taking in the place mentioned: *Johnson v. Wollyer*, 1 Str. 507. But under this issue which denies the taking merely, the defendant can not deny the plaintiffs' property, which is in substance admitted by the plea of *non cepit*: Wilk. Replev. 81; Gill. Replev. 166; 3 Stark. Ev. 1295.

But whatever facts are put in issue by the plea of *non cepit* are not contested in this case. The defendant does not deny the taking in the place mentioned, but says in his brief statement that the property belonged to one Hayden, and that he took it

as Hayden's property by virtue of sundry writs against him. To prove his official character, and that he had in his possession the writs against Hayden, described in his brief statement, he relied on the admissions of the plaintiff to that effect, and to this extent there is no controversy between the parties. Admitting that the property still belonged to Hayden, notwithstanding the alleged sale to the plaintiffs, on account of its fraudulent character, the question arises whether the defendant has shown any authority to interfere with it. He comes here representing creditors, and they may avoid the sale on account of its fraudulent character as to them. But the sale is valid between the parties, and none but creditors can avoid it. But every person who chooses to bring a suit is not therefore a creditor, for something more than his allegation is necessary in order to prove his debt. Creditors or persons calling themselves such, must prove their debts, and until this is done they have no right to interfere.

If, then, creditors can interfere only on proof of an indebtedment by the alleged owner of the property, the sheriff, who is an agent merely, can have no rights greater than those of the principal whom he represents. If a sheriff take my goods by virtue of a writ, his process will be a sufficient justification in an action of trespass which I might bring against him. It would be a sufficient warrant for his interference. But if he take goods in my possession on the ground that my title is a voidable one, he must show that he has a right to avoid it. And as in the present case, his right to interfere depends on the existence of a debt in favor of the attaching creditor, he was bound at least to make out a *prima facie* case of indebtedment.

But the defendant excepts to the ruling of the court which excluded, as he says, his evidence on which he relied to make out a *prima facie* case of indebtedment. This evidence was that he had in his hands a writ against Hayden in which there was a count upon a promissory note, that the action had been entered and was then pending in the common pleas, and that there had been no denial of the signature of the note. But this evidence, if admitted, would not have strengthened his case. All these proceedings merely show that the plaintiff in that action alleged that Hayden owed him, and had commenced a process for the recovery of the debt. The omission to deny the signature to the note proves at most that Hayden's defense was not that the signature was forged, but it by no means shows that he had admitted the debt, nor does it prove the debt in any other manner. The proceedings tend to show that the plaintiff supposed that

Hayden was indebted to him, but they prove nothing more. These remarks are made upon the supposition that the rulings of the court were incorrect, in relation to which other questions arise which we shall shortly consider.

We have been referred to the case of *Widgery v. Haskell*, 5 Mass. 144 [4 Am. Dec. 41], as decisive of the point that in a case like the present, the sheriff is not bound to prove the existence of a debt. That case was replevin for the ship *Mac*. The defendant pleaded that the ship was the property of John Taber & Son, and traversed the property of the plaintiffs, on which traverse issue was joined. It appeared that the defendant was a deputy sheriff, and attached the ship by virtue of a writ in favor of Jacob Barker against John Taber & Son, and Parker, J., ruled on the trial that the defendant was not bound to prove the debt on which the writ was instituted. It was held by the supreme court that this point was not before them, because it had been agreed by the parties that a verdict should be entered for either of the parties according to the opinion of the court, whether the plaintiffs had from the facts stated proved their property in the ship, or not. The case, therefore, is not an authority beyond the respect to which the *nisi prius* ruling of Mr. Justice Parker is entitled, to prove the position for which it was cited. The only issue was on the ownership of the property. If the parties chose to put their case upon that issue, they could try only the questions which that issue raised; and it raised no question as to the existence of any debt from Barker.

The case of *Damon v. Bryant*, 2 Pick. 411, accords with and supports the views we have intimated in this case. There, a sheriff sued in trespass by a vendee of goods, contested the plaintiff's title on the ground of fraud. It was objected that the defendant gave no evidence of a debt from the supposed fraudulent vendor of the goods, and the court were of opinion that this objection was a valid one. It was said that the distinction was, that where the execution or writ upon which goods are taken is against the plaintiff himself, the officer is justified by the precept itself, for that commands him to take the goods of the plaintiff, and is a sufficient authority. But where the goods taken are claimed by a person who was not a party to the suit, and he brings trespass, and his title is contested on the ground of fraud under the statute 13 Eliz., c. 5, a judgment must be shown, if the officer justifies under an execution, or a debt if under a writ of attachment, because it is only by showing that he acted for a creditor, that he can question the title of the

vendee: *Lake v. Billers*, 1 Ld. Raym. 733; *Ackworth v. Kempe*, Doug. 41; *Savage v. Smith*, 2 W. Bl. 1104. The reason for requiring proof of the debt is as strong in replevin as in trespass, and we are of opinion that the defendant was bound to prove that there was a debt actually due from Hayden to the Despatch Line.

But the defendant alleges that he was surprised by the construction put upon the plaintiff's admissions. These admissions were that the defendant was a deputy sheriff, and had in his hands the writs described in his brief statement. The defendant says that he did not suppose from his understanding of those admissions, that there was any controversy about the debts alleged to be due from Hayden to the several plaintiffs, in the writs. It is difficult to make an absolute rule upon this subject, applicable to all cases. The granting or refusing a new trial must depend in a great measure upon the legal discretion of the court, guided by the nature and circumstances of the case, and directed with a view to the attainment of justice: *Bright v. Eynon*, 1 Burr. 390. The court in its discretion may grant a new trial, on the ground of surprise and perturbation on the part of counsel, arising from sudden and dangerous sickness occurring in his family, and coming to his knowledge during the trial, where such perturbation deterred the counsel from making an important claim on behalf of his client, which he had a right to make: *Culler v. Rice*, 14 Pick. 494. The defendant rested his case upon the evidence. He can not properly say that he was surprised that the legal effect of that evidence was not so extensive as he hoped, and make that a ground for a new trial. That a party is surprised is sometimes a reason for granting him a new trial: *Vernon v. Hankey*, 2 T. R. 113; *Hartwright v. Badham*, 11 Price, 383. In *Gist v. Mason*, 1 T. R. 84, the defendant moved for a new trial, on the ground that he had not offered evidence that a certain kind of trading was illegal, because he presumed that the jury, of their own knowledge, must have concluded that the illegality of the contracts was known to the parties at the time of making them. Ashhurst, J., said that the defendant made the application in order to supply his own negligence, when it was evident he was not taken by surprise at the trial. It is possible that the counsel might have been surprised, although we do not well see how even that could have been so, that the court did not agree with him in his views of the law, although that so often happens in the trial of cases that he can hardly ask any indulgence on such

ground. The reason would apply to any case where the evidence has not the effect anticipated; and the meaning and extent of the admission are to us so clear, that we do not think it would be a proper exercise of our legal discretion to grant a new trial for this reason.

The defendant also moves for a new trial upon another ground. It appears that after the evidence was closed, the case argued, and the judge had charged the jury, the defendant moved for leave to lay evidence before the jury, that Hayden was indebted to the Despatch Line of Packets. We will not say that cases might not exist where such an application would be reasonable, and should be granted in the exercise of a sound legal discretion. The case in which it would be allowed, must be one of extreme hardship to the applicant. The court on such a motion will not hear an affidavit of any facts which might have been brought forward at *nisi prius*: *Hope v. Atkins*, 1 Price, 143. The party can not be allowed to take the chance of a trial in such cases, and if he should fail, to reserve to himself the alternative of applying to the court for a new trial: *Harrison v. Harrison*, 9 Id. 89. In addition to this objection, we are asked to rescind the ruling which it was competent for the court below to make in the exercise of its legal discretion. Even where the defendant's witnesses came into court after the evidence was closed, but while the plaintiffs' counsel was addressing the jury, and the court refused to permit them to testify, it was intimated that such refusal was not a ground for a new trial: *Leggett v. Boyd*, 3 Wend. 376. In that case it is said that it is scarcely possible to conceive a case where the court will interfere with the decision of a circuit judge, who has exercised his legal discretion in refusing to delay the trial of a cause until the party can procure the attendance of a witness who is unexpectedly absent when he is called. Certain matters of practice must, from the necessity of the case, be left to the discretion of the court; and when that discretion has been exercised, a revision of it would be attended with excessive delay and expense. The parties must be prepared for trial, they must have reflected on the legal effect of their evidence, and must not depend upon the indulgence of the court to relieve them from the consequences of their own negligence. If cases were more thoroughly prepared, evidence put in more rapidly, and less time consumed in vague and discursive examinations of witnesses, the substantial merits of controversies would be more readily perceived by juries, and the public confidence in the administration of justice would be promoted.

In the present case, the exclusion of the evidence rested entirely in the discretion of the court, and its decision upon the point we can not revise.

Judgment on the verdict.

REFLEVIN DESCRIBED AND DEFINED. and in what cases lies: See notes to *Dunham v. Wyckoff*, 20 Am. Dec. 695, and *Marshall v. Davis*, 19 Id. 463. Against an officer for goods taken under legal process: See *Clark v. Skinner*, 11 Id. 302; *Philips v. Harries*, 19 Id. 166; *Bruen v. Ogden*, 20 Id. 593; *Dunham v. Wyckoff*, Id. 695.

GENERAL ISSUE IN REPLEVIN admits the plaintiff's property in the goods taken: *Harper v. Baker*, 16 Am. Dec. 112.

WILLIAMS v. PUTNAM.

[14 NEW HAMPSHIRE, 540.]

DEMAND AND NOTICE OF NON-PAYMENT ON A PROMISSORY NOTE made in one state and payable in another, in an action against the non-resident indorser, may be proved by a notarial protest.

NOTICE OF THE NON-PAYMENT OF A PROMISSORY NOTE in an action against a resident indorser, can not, by the common law, be proved by the protest.

ASSUMPSIT on a promissory note executed in New Hampshire, payable in Boston. Defendants indorsed the note in New Hampshire. The note was sent to Boston for payment at the place designated, and payment being refused, the same was duly protested. Upon the trial the court held the protest evidence of presentment, demand, and notice to the indorser, and verdict was given for the plaintiff.

Bellows, for the defendant.

Thompson, for the plaintiff.

By Court, PARKER, C. J. It has become almost a trite remark, in the courts of the various states of this union, that although, for certain purposes, the states form but one government, and are properly to be regarded as one entire nation, those purposes are of limited character, and that beyond them, the states conduct their internal affairs as independent communities. Among the relations and subjects with reference to which they are to be regarded as foreign to each other, are those questions which arise as to the drawing, negotiation, presentment, etc., of bills of exchange and promissory notes: *Carter v. Burley*, 9 N. H. 558, 566. With regard, therefore, to a bill of exchange, such evidence of presentment, etc., as has been introduced in this case, would, under the circumstances, be sufficient, if payable in

another state than that in which it was made: *Duncan v. Course*, 1 Mill (S. C.), 100; *Lonsdale v. Brown*, 4 Wash. 86, 148; *Phoenix Bank v. Hussey*, 12 Pick. 483; *Turnsley v. Sumrall*, 2 Pet. 170, 180; *Buckner v. Finley*, Id. 586; *Bank of United States v. Daniel*, 12 Id. 32; *Wells v. Whitehead*, 15 Wend. 527, 531. But the instrument now sued on is not a bill of exchange. On the face of it it presents to us nothing more than an ordinary promissory note. And "a protest of an inland bill or note, is not evidence of a demand or notice." Bayley on Bills, 516; *City Bank v. Outter*, 3 Pick. 414; *Nicholls v. Webb*, 8 Wheat. 326. It appears that this note is dated at Littleton, in this state, and is made payable at a bank in Massachusetts. By the cases above cited, and many others, it is well established, as we have already said, that were the instrument a bill of exchange, these facts are sufficient to make it a foreign bill: *Freeman's Bank v. Perkins*, 6 Shepley, 292.

We are thus brought directly to the point discussed in *Carter v. Burley*, 9 N. H. 558, 564, and again alluded to in *Smith v. Little*, 10 Id. 526, 531. In the last case it is said, that "an indorsed note, though it may have a similitude to, and an operation like a bill of exchange, is not one, technically speaking; and it is not necessary to prove its dishonor by a protest, even where the maker and indorser reside in different governments." But it by no means follows that it may not be proved in that way, although it is not necessary so to prove it. And we have no hesitation in adopting the conclusions to which the reasoning in those cases leads, but which were not points actually decided in either of them. It is not necessary to repeat the reasoning at large. Each indorsement of a bill is, in effect, a new bill, drawn by the indorser upon the acceptor; and the similarity between the indorsement of notes, and the drawing and indorsement of bills of exchange, is so great, that there can be no sound reason given for establishing or preserving a distinction between them, and requiring a different character of evidence to prove the same facts with regard to two instruments, which though different in some respects as to their formal phraseology, are so essentially similar in their nature and operation.

Thus far the ruling of the court below was right. The protest is to be received as evidence of the presentment and demand. But a distinction is taken as to the proof of notice. "Although the protest must be made according to the law of the place of acceptance, yet the notice to the drawer must be according to the

law of the place where the bill was drawn, and to the indorsers according to the law of the place where their indorsements were respectively made:" Story on Bills, sec. 285; 1 Chit. & Hulme on Bills, 167, 9th ed. Now the place at which the defendants indorsed this note, was within the state of New Hampshire, and at the time the note matured (August 21, 1840), a protest was not, in this state, evidence that notice of the dishonor of the note had been given to the indorser. The revised statutes, passed in 1842, have altered the law of the state in this respect: See c. 14, sec. 8. But that can not affect this case. At the time of the transaction we are now considering, the law was otherwise, and the instructions of the court on this point were erroneous. The defendants' motion, therefore, must prevail.

New trial granted.

NOTARIAL PROTEST, WHEN EVIDENCE OF DEMAND AND NOTICE: See *Miller v. Hackley*, 4 Am. Dec. 372; *Browne v. Philadelphia Bank*, 9 Id. 463; *Stewart v. Allison*, Id. 433; *Sharpe v. Bingley*, 12 Id. 643; *Hoff v. Baldwin*, 13 Id. 385; *Bell v. Perkins*, 14 Id. 745; *Dunn v. Adams*, 35 Id. 42.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

COMBS *v.* LITTLE.

[8 GREEN'S CHANCERY, 310.]

PARTY LOSES RIGHT OF REDEMPTION of property sold under execution, though the vendee purchases with the object and under a parol agreement to permit the execution debtor to redeem, when the latter, after being in possession for some time, executes a covenant to abandon all possession or right to possession of the land.

RIGHT OF REDEMPTION OF LAND SOLD UNDER EXECUTION exists where the land is sold at a low figure, and others do not bid because it was understood that the purchaser was buying it for the execution debtor.

ARBITRATORS NOT BEING SWORN, the whole proceeding is void.

BILL for redemption of real estate. The material facts are set out in the opinion. The bill also prayed an injunction to restrain defendant from proceeding at law to recover certain of the property from the complainant. The answer denies the right of redemption; alleges that if it ever did exist it had been forfeited; that if complainant is entitled to redeem, there is still a large sum owing from him to defendant, as shown by an award of certain arbitrators, to whom their affairs had been submitted. The defendant answers that the arbitrators were not sworn.

Vroom, for the complainant.

Dayton, *contra*.

DICKERSON, Chancellor. The complainant, who was a considerable landholder in the counties of Monmouth and Middlesex, became embarrassed, and his property was sold under executions issued from the courts of law and from this court. One farm,

located at Middletown, was purchased at a master's sale, in 1835, by Mr. Croes, who has since sold it for the price he paid for it, to the defendant. Prior to this, the defendant had purchased, himself, three tracts of woodland belonging to the complainant, at a sheriff's sale. The allegation is, that all this property was purchased on behalf of the complainant, and with the understanding that he might redeem it by paying what it cost the purchasers.

There is a wide difference in the position of the case, as to the farm purchased by Croes, and the wood lots purchased by the defendant himself. The sales were made at different times, and by different officers, and there are facts connected with the one which do not at all belong to the other. As to the farm sold to Mr. Croes, there is no difficulty in arriving at the character of the sale. Mr. Croes having conveyed the property without covenants as to the title, is a competent, and certainly every way a reliable witness, and he states frankly that his object in buying the property was to befriend the complainant. The right to redeem was clearly agreed to. The plan was to sell off the wood and pay in that way, as far as it would go, and then the complainant was to pay off the balance, compensate Mr. Croes for his trouble, and take the land back. Trusting, as men are apt to do, in their transactions with one another, that each will perform his part faithfully, there was no time fixed when this redemption should take place, or in what manner the business should be accomplished. This answered very well for the complainant, but having paid his money, it became irksome to Mr. Croes, and worked towards him a positive injury. The course pursued by the parties since the purchase, has, I think, completely absolved Mr. Croes from all obligation in law or equity to convey any of the property purchased by him, back to the complainant. The sale to Croes was in December, 1835; he bought not only this farm, but other tracts, to the amount in all, of four thousand two hundred and forty dollars. The other tracts Croes gave a high price for, but this farm was sold low; the agreement was that the complainant might redeem the whole, but he passes by the other lands, and seeks to redeem this farm alone. If there was no other objection, this would be enough. He can not, under any circumstances, be allowed to redeem a part, without the whole.

The complainant has behaved vexatiously to Croes in this business; he came into it to help the complainant, and to save his property for him, but he gave him in the first instance a

wrong impression as to the property, leading him to believe a large tract of valuable woodland was included in it, which turned out not to be so, and afterwards kept him out of possession. In February, 1836, however, the complainant executed a paper to Mr. Croes, which puts an end to the whole contract for redemption. That paper declares the complainant thereafter to be only the agent of Croes in the said lands, and covenants to abandon all possession or right to possession in them. He also agrees to pay rent for the land he occupies himself, and directs his tenant on the Middletown farm (the one now in question) to consider Croes as the landlord, and yield to him the possession. After this the complainant still paid no rent, but refused to give up possession, and Croes brought suits against him, and then for the sake of peace let him remain in possession another year, upon an agreement that he might redeem it at any time within that year. He did not redeem it within this time, and Croes had finally to go with the sheriffs of Middlesex and Monmouth (for the property lay in two counties), and with other force, to obtain possession, and gave him fifty dollars to give it up peaceably, which he did. After all this, there is no pretense, in my opinion, on the part of the complainant, for any further right to redeem this property. He has yielded all his right, and should remain satisfied. The evidence attempting to show fraud or any misunderstanding on the part of the complainant as to this paper, is entirely unsatisfactory. It appears further, that Croes was anxious the complainant should take the property at any time, but he never would. He had a hard bargain of it, and has received nothing in return for his kindness but trouble and vexation.

As to the wood lots, whatever might have been the original design of the defendant, the weight of evidence is clearly in favor of the complainant's right of redemption. The lots sold low, and others did not bid, because it was understood they were sold for complainant's benefit. The evidence is sufficient to establish this point, without relying upon the witnesses whose competency is brought in question; and it would be useless, therefore, to settle that point. William Hawkins, William Combs, Cornelius Boice, and Robert Mathews, all prove sufficient for this purpose, and even John M. Perrine, the sheriff who sold the property, and Nicholas M. Disbrow, the crier at the vendue, both say it was their impression, from what they saw and heard at the sale, that the defendant bought for the complainant. This whole business seems to have been managed

in a careless manner, and just so as to place the advantage on the side of the complainant. It is sufficient for the present purpose, however, to be satisfied that the right of redemption of the three wood lots referred to in the bill, is with the complainant, and that he is entitled, from the evidence, to be restored to his land upon paying what shall be found due, if anything, on settlement of accounts between him and the defendant.

From some expressions which fell from the witnesses, it would seem that the redemption was to take place upon the defendant being paid the whole that complainant owed him, whether particularly relating to this land or not. He stepped in as his friend and bought his property, with the promise that when he was made whole for whatever complainant owed him, he should have his land again. The defendant will also be entitled to a fair compensation for his time, trouble, and expenses bestowed on this business. This is no more than is just and proper under the circumstances. So far as relates to the arbitration which has taken place between these parties, it can pass for nothing, in the view which I take of this case. In that arbitration the Middletown farm was embraced, and quite probably, as suggested in the argument, from a desire on the part of the defendant to do almost anything to get through with this tedious and unpleasant controversy. My own opinion is, that as the arbitrators were not sworn, the whole proceeding is void.

The injunction, therefore, having relation only to the ejectment brought by the defendant to recover possession of the Middletown farm, was rightly dissolved, and that order must be confirmed. The usual reference, upon the other part of the case, must be made to a master, to state an account between the parties, in conformity with the views expressed in this opinion.

Reference to a master.

AGREEMENT TO HOLD LAND PURCHASED ON EXECUTION FOR DEFENDANT, EFFECT OF.—Numerous cases have arisen in which a debtor whose land is about to be sold on execution enters into a parol agreement with a third person, by which the latter agrees to purchase the land and hold it for the benefit of the debtor, to be reconveyed to him on being reimbursed his expenses with interest. In consequence of this agreement, the debtor may relax his efforts to pay the debt, or the purchaser may be enabled to obtain possession at much less than the market value by making this arrangement known at the sale, and thus preventing competition in the bidding. It is well settled that the result of such an agreement is to establish the relation of trustee and *cestui que trust* between the parties, and that the purchaser holds the land for the benefit of the debtor, and will be compelled to reconvey on being paid his expenses and interest: *Adams v. Kable*, 6 B. Mon. 384; *Martin v. Martin*, 16 Id. 8; *Lillard*

v. *Casey*, 2 Bibb, 459; *Miller v. Anile*, 2 Bush, 407; *Green v. Ball*, 4 Id. 586; *Williams v. Williams*, 8 Id. 241; *Gillespie v. Stone*, 70 Mo. 505; *Marlatt v. Warrick*, 18 N. J. Eq. 108; *Strong v. Glasgow*, 2 Murph. 289; *Neely v. Torian*, 1 Dev. & B. Eq. 410; *Turner v. King*, 2 Ired. Eq. 132; S. C., 38 Am. Dec. 679; *Vannoy v. Martin*, 6 Ired. Eq. 169; *Mulholland v. York*, 82 N. C. 510; *Vestal v. Sloan*, 76 Id. 127; *Haines v. O'Conner*, 10 Watts, 313; *Beegle v. Wentz*, 55 Pa. St. 369; *Cook v. Cook*, 69 Id. 443; *Boynnton v. Housler*, 73 Id. 453; *Faust v. Haas*, Id. 295; *Keith v. Purvis*, 4 Desau. Eq. 114; *Denton v. McKensie*, 1 Id. 289. In this last case an agent of the purchaser had tendered the debtor an account in which the debtor was charged with the amount of the purchase money, and the court held that this was a sufficient memorandum to take the case out of the statute of frauds. In *Abernathy v. Hoke*, 2 Ired. Eq. 157, it was held that a court can not allow a redemption unless upon proof of a distinct agreement to redeem, or upon evidence of undue advantage taken of a debtor, or imposition on him. And mere proof of friendly intent by defendant to favor the plaintiff by allowing him to use the property on advantageous terms, or even to let him redeem if he pay in a reasonable time, would not entitle plaintiff to a decree. And in *Gillespie v. Stone*, 70 Mo. 505, the court affirmed the general rule, but held that to entitle a debtor to redeem, it must be shown: 1. That such agreement was made before the sale; 2. That it deterred others from bidding; 3. As explanatory of the foregoing, the actual market value must be shown, as a great disparagement between it and the price paid would have a material bearing with a court of equity in reaching a conclusion where evidence on the main points was inconclusive; and 4. The date of the offer to redeem, which should be in a reasonable time. And in that case, as the offer had not been made for ten years and six months after the sale, it was so unreasonable that the court refused to grant relief.

The statute of frauds does not apply to these contracts, for they establish a trust relation between the debtor and the purchaser. "To apply the statute of frauds as a barrier to relief, would be to make the statute an instrument for the perpetration instead of the prevention of frauds," *per* Crenshaw, J., in *Martin v. Martin*, 16 B. Mon. 8. There are some decisions, however, which hold the contrary, and say that such a contract, unless in writing, is void: *McKee v. Vail*, 79 N. C. 194; *Barnet v. Dougherty*, 32 Pa. St. 371; *Dollar Savings Bank v. Bennett*, 76 Id. 402. These cases do not seem to have met with much favor. Thus, in *Mulholland v. York*, 82 N. C. 510, where this question was before the court, Smith, C. J., after affirming the general rule as above laid down, commented upon the decisions of that state, and said: "We have not overlooked the more recent case of *McKee v. Vail*, 79 N. C. 194, wherein Mr. Justice Reade declares such a contract, when not in writing, void. No authority was cited for the proposition, and it was not involved in the decision, since the jury find there was no contract, parol or other, to which it could apply. Moreover, in that case there were no confidential relations subsisting between the parties, and the promise, if made, was a mere gratuitous undertaking, supported by no consideration and without any equitable element. We prefer to adhere to the train of preceding decisions." In the case of *Barnet v. Dougherty*, 32 Pa. St. 371, a debtor attempted to prove by parol that the purchaser had agreed to buy the land as his agent. The court held, that since the passage of the act of April 22, 1856, a trust in land could be established in no other way than by a writing, and then continued: "The proviso [of the statute], indeed, excepts from its operation resulting trusts, such as the law implies. A resulting trust, however, is raised only from fraud in obtaining the title, or from payment of the purchase money when the title is acquired. * * * The defendant's

offer, in this case, was not to show any fraud in making the purchase at sheriff's sale, such as to constitute Richards [the purchaser], or his grantee Dougherty, a trustee *ex maleficio*. No misrepresentation, no management of any kind was averred; none was offered to be proved. * * * It was nothing more than a violation of an alleged promise, either implied or express, which is of no avail to induce a chancellor to decree the purchaser to be a trustee." This case can not be regarded as affecting the general rule; and if it did, subsequent cases in the same state counteract its effect. There is, however, a later case in Pennsylvania, that of *Dollar Savings Bank v. Bennett*, 76 Id. 402, in which Sharswood, J., said: "Nothing is clearer in principle or better settled by authority, than that a mere naked, verbal agreement by a purchaser at a sheriff's sale, with his own money, that he will hold the premises in trust for the defendant, neither vests any equitable estate in the defendant under the statute which prohibits parol declarations of trust—so that no claim to the money could exist in him under the common count—nor does it give any ground for an action, being a mere *nudum pactum*." This case has been subjected to some criticism, and Freeman, in his work on executions, at section 337, referring to it, said: "This case does not profess, however, to specify the circumstances in which the agreement will be considered as a 'mere naked agreement;' and from prior decisions in the same state, we infer that, even there, a purchaser under such a parol agreement will be held as a trustee where it is shown that the transaction was intended as a mere mortgage, or where, owing to the agreement, the purchaser had been permitted to bid in the property upon terms that would not otherwise have been open to him."

In *Martlett v. Warrick*, 18 N. J. Eq. 108, the principal case was referred to as settling the question in that state, and the court said: "This decision is founded upon the plainest principles of equity." In the subsequent case of *Merritt v. Brown*, 21 N. J. Eq. 401, it was held that such a contract could be sustained only on the ground of fraud; and that where the elements of the case were simply a purchase under a parol promise to hold for the benefit of the defendant in execution, such a transaction could not be enforced either at law or in equity. The court referred approvingly to the principal case, but distinguished it, as it contained circumstances of fraud. The general rule is not affected by this case, as the court admitted that "whenever an agreement of this nature has been entered into, and the purchaser has made use of it, or of any other contrivance, to obtain the property in execution for an inadequate price, or to the oppression of the defendant, the right to equitable relief is clear;" but as the complainant in that case had agreed to redeem in sixty days after the sale, and had failed to raise the money for two years and a half, and had permitted the purchaser in the interim to improve the property, he was held to have lost his right.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

**DUMMER *ads.* DEN EX DEM. SELECTMEN OF
JERSEY CITY.**

[1 SPENCER, 86.]

NO PARTICULAR FORM OF DEDICATION IS NECESSARY, nor is it essential to its validity, that the land should be in the actual use or occupation of the public.

LAND IS SUFFICIENTLY DEDICATED when the owner of a tract which has been mapped out as a city, marks it on the map as public land reserved from sale, and it is regarded by the public and the grantor as reserved for a public market-place, though it is partly under water and has not been used by the public.

DEDICATION OF LAND DOES NOT CARRY THE FEE where the public could enjoy the premises for the purposes intended as fully without as with it.

WHERE A PARTY CONVEYS LAND DEDICATED TO THE PUBLIC, the fee to the land passes, subject to the legal right vested in the public to the possession and use of the land.

EJECTMENT MAY BE MAINTAINED AGAINST OWNER OF FEE when the plaintiff is entitled to the possession of the premises.

EJECTMENT MAY BE MAINTAINED FOR LAND DEDICATED TO THE PUBLIC before the passage of an ordinance appropriating the land for the purpose specified.

EJECTMENT in the circuit court of Bergen. Verdict for plaintiff by direction of the court, with liberty to defendant to move this court to set it aside and enter a nonsuit. One Dey purchased a tract of land as a site for a city, and caused it to be laid out in streets and squares. A portion of the premises, covered mostly by water, was marked as public land and withheld from sale. This portion was known by the people as the

"market ground." The premises in controversy are a part of this tract. The property was divided into shares by Dey and sold, and the purchasers were incorporated by the legislature; the company subsequently became owners of all the land by conveyance from Dey. The freeholders and inhabitants of this district were afterwards incorporated as a city; but before the passage of this act, the associates had conveyed to the defendant the premises in dispute, but, by the terms of the deed, "without prejudice to the rights and privileges of any other person or persons, and subject to all such rights and liabilities." The defendant knew at the time that the land was marked as reserved for public purposes, and once said he would give it up if the public wanted it. The land was never used or inclosed by the public, but had been improved by the defendant, who was in possession. A rule to show cause why verdict should not be set aside was granted upon the return of the *postea*.

A. S. Garr and George Wood, in support of the rule.

P. Bently and I. H. Williamson, *contra*.

By Court, NEVIUS, J. From the facts of the case it is clear that Dey, the owner of these lands in 1804, intended to appropriate the premises in dispute to some extent, to public purposes. That this intent was carried out as far as the situation of the property and other circumstances connected with it, at that time, admitted. He caused it to be laid down as a square reserved for such purposes, and not for sale as other lots, in a map or plot of his new city, which contained a delineation of the avenues, streets, alleys, and public squares, which were to remain open for public use, church grounds, etc. In his conveyance to the associates in 1805, this map is referred to as the plan or plot of the contemplated city, and this particular lot declared to remain for the uses for which it was originally appropriated. In all the subsequent conveyances of lots by the associates, this map was referred to, recognized, and adopted, thereby carrying out as far as called for, the design of the original proprietor. Although it was not in the actual occupation of the public, or perhaps in a condition to be used for a market, yet the acts and conduct of Dey and his grantees, the Associates of the Jersey Company, amounted to a dedication of it to the public for a market-place. No particular form of dedication is necessary: *City of Cincinnati v. Lessees of White*, 6 Pet. 440; nor is it essential to the validity of a dedication, that the land shall be in the actual use or occupation of the public.

Here an important question arises, what is the nature and extent of such a dedication? Does it extend to the fee of the land, or is it only a right in the public to its use. The plaintiff contends, that it is a dedication of the whole interest or estate of the owner; whilst the defendant insists, that if there was a dedication at all in this case, it extended to the use only, and that the fee of the land remained in the associates. In support of the position assumed by the plaintiff, the counsel have referred us to the case of *The City of Cincinnati v. Lessees of White*, 6 Pet. 431, being a leading case upon the subject of dedications. Upon a careful examination of that case, I do not find it to maintain the doctrine contended for. The court there say, "that the law applies to dedications, rules adapted to the nature and circumstances of the case; and to carry into execution the intention and object of the grantor, and to secure to the public the benefit held out and expected to be derived from and enjoyed by the dedication:" Id. 435; "that the public must necessarily be the only grantees, and the fee, if it can not pass to them, must be considered in abeyance until there is some legal body created by law, capable of taking it for the purpose designated:" Id. 439. This last remark, if true at all, of which I entertain serious doubts, may be considered as applicable only to cases of dedication where the legal title to the fee may be necessary for the enjoyment of the use, or for the purpose for which it was dedicated. As where lands are dedicated and directed to be sold, and the proceeds applied to the erection of a church or other public building. But even in that case I should rather incline to the opinion, that the fee remained in the grantor, and that the public; when enabled to take it, should appeal to a court of equity for aid in perfecting their title, in case the grantor should refuse to make it perfect, by a conveyance of the fee. But in the case before us, it seems to me by no means necessary to construe this dedication as carrying the fee of the land out of Mr. Dey or the "associates." The public could enjoy the premises for the purpose intended, as fully without as with it, and I can see no difference between the dedication of this market-place and the dedication of lands for public streets. They were designed only for the purposes specified, and if the whole project of the contemplated city had failed, no streets, public squares, or market-places, would in that case have been needed, and Mr. Dey or his grantees would have remained in possession of the lands by virtue of their original title, and might have disposed of them as they saw fit. But

suppose the doctrine of the plaintiff is true, and at some future day the inhabitants of Jersey City should, by a legal and conclusive act, abandon this land for market purposes, how are the grantors to become reinvested with their former title, if the fee passed out of them? Will it revert by mere operation of law? I think not, and can not doubt but that the fee of the land thus dedicated remained in Mr. Dey, till he conveyed it to The Associates of the Jersey Company, and that they held it, and had a right to grant it to such person and for such consideration as they pleased, and that a legal right to the possession and use of the land for the purposes intended, vested in the public, and that the defendant took his title subject to such right of possession and use.

The next question is, whether the plaintiff can maintain this action for the recovery of the possession of this land. By the act of incorporation, the lessors of the plaintiff represent the public or the inhabitants of Jersey City, and the rights of the public in common property, are vested in them, and if such rights can not be enforced in their name they can not be enforced at all.

But is ejectment the proper remedy, or if it is, under ordinary circumstances, can they maintain it under the circumstances of this case? The defendant contends, that this is not the proper remedy in the present case: 1. Because their right is only an equitable right, and that in this action no recovery can be had against the owner of the legal estate; and 2. If in ordinary cases this action would lie, it can not be sustained here until the public or the corporation have by ordinance or some public act appropriated the premises for the purpose of a market or signified their intention to do so. I do not think either of these objections well taken. Ejectment is a possessory action, and if the lessors of the plaintiff are entitled to the possession, and they must be if they are entitled to the use, for they are inseparable, it is a legal and not a mere equitable right, and they may recover it against the legal owner of the fee. Nor were the lessors of the plaintiffs bound to pass any such ordinance before suit brought: their right to the immediate possession did not depend upon doing so. And it would seem more proper, that they should first obtain the power of converting the land to the purposes designed, by getting the possession, than to make an appropriation while it was adversely held by another.

Rule discharged.

DEDICATION TO PUBLIC USE.—This subject is discussed at length in the note to *State v. Trask*, 27 Am. Dec. 554. See also *Le Clerq v. Trustees of*

Gallipolis, 28 Id. 641; *Hobbs v. Lowell*, 31 Id. 145; *Vick v. Mayor of Vicksburg*, Id. 167; *Valentine v. Boston*, 33 Id. 711; *Lebanon v. Commissioners of Warren Co.*, 34 Id. 422; *Municipality No. 2 v. Cotton Press*, 36 Id. 624. The principal case was approved in *Morris Canal and Banking Co. v. Central R. R. Co.*, 1 C. E. Green, 436, 437.

PUBLIC ACQUIRE MERE EASEMENT BY DEDICATION, and not a right to the soil itself: *Pomeroy v. Mills*, 23 Am. Dec. 207.

HAZELTON COAL CO. v. RYERSON.

[1 SPENCER, 129.]

IN GIVING NOTICE OF DISHONOR, the law but requires due diligence in the communication.

NOTICE SENT BY MAIL IS SUFFICIENT if directed to the post-office where the indorser usually receives his mail, though it is not the post-office nearest his residence.

ACTION against the defendant as indorser. The notary, in giving notice, had directed it to the defendant at Pompton post-office, when there were two other offices nearer his residence. It was shown that the defendant was in the habit of receiving his mail at Pompton. The court charged the jury that the notice was sufficient if the defendant was in the habit of receiving his mail there. Verdict for plaintiff. Upon the return of the *postea*, defendant obtained a rule to show cause why a new trial should not be granted on the ground of misdirection.

P. D. Vroom, in support of the rule.

H. W. Green, *contra*.

By Court, WHITEHEAD, J. The single question presented by the case is, whether the notice of non-payment, to the indorser, was sufficient. There were two offices nearer to the defendant's residence than the one to which the notice was sent; but it was in evidence that he was in the habit of transacting his business through the latter office. The undertaking of an indorser of a negotiable note or bill is, that if the same be not paid by the drawer upon a proper demand made at the time when by the terms thereof it becomes payable, and due notice of such non-payment be served upon him, that he will pay the amount to the holder. His liability is conditional. If the holder perform the duties the law enjoins upon him, in making demand and giving notice, the indorser becomes absolutely bound for payment, but a default in either will discharge him. The object of the notice

is to apprise the party of the dishonor of the note, that he may understand his consequent obligations and resort to the parties liable to him. All that the law requires of the holder is, the exercise of due diligence in communicating the notice. If the parties do not reside in the same town, the notice may be sent by a special messenger, or through the post-office. The law allows the latter mode of transmitting it, because it is the usual and ordinary mode of conveyance, and affords reasonable ground for presuming that it will be brought home to the party without unreasonable delay. If it be adopted, the holder is not bound to prove the actual receipt of the notice by the indorser. He is required to exercise due diligence in learning the residence of the indorser, and in sending by mail in proper time, the notice directed to him at the proper place.

Was the notice in this case sent to the proper place? It was not sent to the office nearest to the defendant's residence, but to the one through which he was in the habit of receiving his letters. This is evidence of due diligence on the part of the holder; for the reason, that in transacting his business at this office, the defendant has in effect notified his correspondents and others, that it was the place to which he desired letters to him to be directed. The presumption is, that information conveyed in this way would be received as soon, if not sooner, than if directed to him at the office nearest his residence, but to which he did not usually resort for letters. Such notice has been repeatedly adjudged sufficient. In the case of *The Bank of Geneva v. Howlett*, 4 Wend. 328, the court decided, that "it is not indispensable that the notice should be sent to the office nearest to the residence of the party, nor even to the town in which he resides. It is sufficient if it be sent to the office to which he usually resorts for his letters, and where he would probably receive it as soon as at the office nearer to him." See also to the same effect *Reid v. Payne*, 16 Johns. 218 [8 Am. Dec. 311]; *Downer v. Remer*, 21 Wend. 10; *Downer v. Remer*, 23 Id. 620; *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Bank of United States v. Carnal*, 2 Id. 543; Judge Story, in his book on bills of exchange, page 332, treats this as the correct rule, and in the same work, page 454, adds, "if the notice goes by mail, it should be directed and go to the post-office of the town in which the party dwells, or to the post-office, if known, where he is accustomed to receive his letters, or to the nearest post-office, if there be none in the town."

The reasonable and correct rule, as founded in convenience to

the parties, is, that the notice should be sent to the post-office nearest to the residence of the indorser, or to the office to which he usually resorts for letters; or if he be in the habit of receiving his letters at various post-offices to suit his business, then it is sufficient to send it to either. In adopting this rule we conflict with the rule declared by this court in *Ferris v. Saxton*, 1 South. 1, that the notice must in all cases be sent to the post-office nearest to the actual residence of the party; and that until this be done, the indorsee has no possible claim against him.

It is manifest upon reading the report of this case, that the law upon this subject was not at that time well understood. For the chief justice who tried the cause, upon the motion to nonsuit the plaintiff for the insufficiency of the notice, observed "this question of due notice on the non-payment of notes, has not been very satisfactorily settled in New Jersey; the old practice, and indeed the practice up to this day, so far as I know, has been to consider the indorser merely as a security for the maker of the note, and if he would exonerate himself, to put him to show, that the non-payment had been owing to want of due diligence in the holder, and that if condemned, the loss would fall upon him, for want of reasonable notice of such non-payment. Upon this principle, it has been the course of the court to submit the question of due diligence and reasonable notice, as a matter of fact, to the consideration of the jury, and not as a matter of law, to the opinion of the judges."

Besides, there was nothing in the circumstances of that case which called for the adoption of any other rule. The proof of diligence on the part of the plaintiff was clearly insufficient. The notice to the defendant was sent by mail to the Flemington post-office, distant ten miles from his residence, while there were several other offices nearer his residence; and there was no evidence that he was in the habit of receiving his letters at the Flemington office. The only evidence of diligence on the part of the plaintiff, was that of the notary, who testified, "that he inquired of one Samuel Holcomb, of New Brunswick, who came, he understood, from the part of the country where Saxton lived, and had connections in trade there, and was informed that Flemington was the most likely place of his receiving a notice." It does not appear that he inquired of the officers of the bank, or of any other person than Holcomb, as to the defendant's residence. Under this evidence, the court were right in adjudging the notice to be insufficient. But the rule they laid down, to be of general and universal application in other cases

and under other circumstances, is too strict. It is an inconvenient rule, and can not be sustained upon principle.

The cases of the *State Bank at Elizabeth v. Ayers*, 2 Halst. 130, and of the *Paterson Bank v. Butler*, 7 Id. 268, referred to by the defendant's counsel, did not call for any modification or extension of the rule declared in *Ferris v. Saxton*. Ford, J., in 2 Halst. 131, remarks: "If the indorser live in a city or place different from the holder, he may be served with notice by letter directed to the post-office which is nearest to his residence." The notice in that case was sent to the office nearest to the defendant's residence, and this under any circumstances is a good service. There being no evidence that he transacted his business through any other post-office, the court were not called upon to decide the question raised in this case. Let the rule to show cause be discharged and judgment entered for the plaintiff.

Judgment accordingly.

NOTICE BY MAIL TO INDORSER: See *Mead v. Carnal*, 39 Am. Dec. 552, referring to other cases in this series.

TINDALL *ads.* DEN EX DEM. CONOVER.

[1 SPENCER, 214.]

DEFENDANT IN EJECTMENT IS ESTOPPED TO DENY PLAINTIFF'S TITLE when he has once admitted it, without fraud practiced upon him.

CONSTRUCTION OF CONTRACT SHOULD BE GOVERNED BY THE INTENTION of the parties, as gathered from its terms.

CONTRACT TO DELIVER A "GOOD AND SUFFICIENT DEED, with covenants of warranty," will be held to mean a good and sufficient title, when it appears from the agreement and the attendant circumstances that such was the intention of the parties.

DEFENDANT ADMITS PLAINTIFF'S TITLE BY EXECUTION OF SUCH AGREEMENT, and can not afterwards deny it; and the plaintiff is not bound to produce further evidence of title than the agreement.

EJECTMENT tried at the Mercer circuit. Plaintiff offered in evidence a written agreement between the parties, by which he covenanted to give a "good and sufficient deed, with covenants of warranty," to the defendant. A tender of performance and demand were also proved. He did not offer any further evidence of title. A motion was made by defendant for a nonsuit, on the ground that the agreement was no evidence of title. The motion was denied. He then introduced evidence to show that plaintiff had no title at the time of the agreement and the tender of the deed. The court ruled that the defendant was

estopped to deny the plaintiff's title from the agreement. Verdict for plaintiff. On the return of the *postea*, a rule to show cause why the verdict should not be set aside was granted.

W. Halsted, in support of the rule.

H. W. Green, *contra*.

By Court, *Nevius, J.* The defendant insists that the court erred in refusing to nonsuit, as the agreement was no evidence of title; and afterwards in overruling his offer, as the agreement contained no admission on his part of title in the plaintiff. It is important therefore to inquire, what is the true meaning and legal construction of this contract, for it will not be denied, that where a defendant in ejectment has admitted the plaintiff's title without fraud practiced upon him, he shall not afterwards be permitted to deny it. But the defendant denies that he ever admitted the plaintiff's title, as there is no allegation of title in the written agreement, and that therefore, he was bound to prove it otherwise than by the agreement itself. He insists that the language of the covenant, "to deliver a good and sufficient deed with covenants of warranty," does not refer to the title, but only to the instrument, and means a conveyance of such estate only as the plaintiff has in the premises.

The effect of such a covenant has often been discussed and received a judicial construction. In the case of *Chute v. Robison*, 2 Johns. 595, it was unanimously resolved by the court of errors of New York, that "a covenant to deliver a good and sufficient deed means one that conveys a good and sufficient title." The authority of this case has however been impugned, if not wholly overruled, by subsequent decisions in the supreme court of that state. In *Van Eps v. Schenectady*, 12 Id. 436 [7 Am. Dec. 330], it was adjudged that "an agreement to execute a deed is satisfied by executing a deed without covenants." And in *Gasley v. Price*, 16 Id. 269, the court say that "the additional words good and sufficient do not alter the construction of the agreement, but only denote the species of deed to be given and have no reference to the title." In *Parker v. Parmele*, 20 Id. 130 [11 Am. Dec. 253], Chief Justice Spencer, in giving the opinion of the court, approves the decision in the case last cited and says that "the same construction is to be put upon the words 'a good warranty deed of conveyance,' as upon the words 'a good and sufficient deed;' that both relate to the instrument and not to the title." The plaintiff has referred us to other cases in the same court supposed to militate against the doctrine of those just mentioned.

Upon examining them it will be found that the language in some was "a conveyance of land," and in others for the "purchase of lands," both of which expressions were adjudged to refer to title and not merely to the instrument of conveyance. But whatever may be the conflicting opinions on this question, or whatever doubt may exist as to the soundness of the construction given by the supreme court of New York, to the words, "a good warranty deed of conveyance," I apprehend this court took a more correct and rational view of the question in *Barrow v. Bispham*, 6 Halst. 119. Judge Ford delivered the opinion of the court in that case, and after referring to the cases last cited, without objection, says, "as the words 'good and sufficient deed' have a meaning in themselves which is neither doubtful nor ambiguous, we have no right by any known rules of construction, to depart from the plain meaning of the word deed and stretch it to mean title, which is of so much larger and comprehensive import, unless there was something else in the same instrument or in the attendant circumstances, to demonstrate that the parties, by the word deed, meant title."

If this was entirely an open question in this court, I confess I should strongly incline to adopt the construction given by Judge Kent and the court of errors in *Clute v. Robison*. The intention of parties to a contract, as gathered from its terms, should govern its construction. Now I undertake to say, that in a written contract for the sale and purchase of lands, the phrase "a good and sufficient warranty deed" will be understood by more than nine tenths of mankind, not excepting the legal profession, to mean a good and sufficient title. That if a person intended to sell and another to buy a doubtful or uncertain title, or anything less than a good and sufficient legal title, in reducing their contract to writing, they would not use this phrase, but would define the interest bargained for. The substance of these contracts, in general, is the estate bargained for, and not the deed, which is only the mode of conveying it. And a good and sufficient deed of conveyance for lands conveys to my mind the idea of a good and sufficient title to such lands. If these words, unexplained and unqualified, are to be referred only to the character of the instrument, a covenant to make such a deed may be performed without conveying the shadow of estate or interest. In *Jackson v. Ayres*, 14 Johns. 224, it was adjudged that a covenant "to convey lands" was a covenant to convey a good title to them. I ask, then, does not a covenant "to make a deed for lands," mean "a deed of conveyance for

the lands," and is not that its universal acceptance? But without meaning to come in conflict with adjudged cases on this subject, and especially with the decision of our own court, I adopt the principle in the case of *Barrow v. Bispham*, and inquire whether there "is not something else in the agreement before us, or in its attendant circumstances, to demonstrate that the parties, by the words 'good and sufficient deed, with covenants of warranty,' meant 'a good and sufficient title'?" I apprehend that such intention is manifest from the nature of the contract and its attendant circumstances. It is a contract for one hundred and sixty acres of improved land, with the buildings, for the consideration of seven thousand six hundred dollars, to be paid in five annual installments, with interest. The whole purchase money was to draw interest for one year, before the deed was to be delivered, and this probably in lieu of the rent; after the first installment was paid, the balance was to be secured by a mortgage on the lands. All this indicates that the defendant was bargaining for a title, and that the parties so understood it, for we can scarcely believe that he would part with so much money for anything less than a good and sufficient title. And notwithstanding all that is said in the cases I have referred to, I can not but think that the covenant to warrant implies a warranty of title to the fee simple of the land, and not merely to such estate as the plaintiff might have in it.

If I am right in this view, it will follow, that by the execution of this agreement, the defendant admitted the plaintiff's title, and can not, in this action, gainsay or deny it. The plaintiff, therefore, was not bound to show any further title to the lands, and the court was right in refusing to nonsuit. Nor could the defendant lawfully give evidence of title in another. If it were true that the plaintiff had no title in fact, either at the date of the agreement or the time fixed for the delivery of the deed, yet the defendant could take no advantage of it in this action, unless he could show that the contract was obtained from him by fraud. But his remedy would be against the plaintiff, for a breach of his covenant, provided he, the defendant, had performed, or tendered himself ready to perform, his own covenants. My opinion is, that the court was right in overruling the evidence offered, and that the motion to set aside the verdict should be refused.

Rule discharged.

ELMER and WHITEHEAD, JJ., did not hear the argument, and gave no opinion.

THE PRINCIPAL CASE WAS AFFIRMED in the court of errors and appeals: *Tindall v. Den*, 1 Zab. 651.

AGREEMENT TO GIVE A DEED, EFFECT OF.—A covenant to give a "lawful deed of conveyance," means a deed conveying a lawful or good title: *Deart's v. Williamson*, 7 Am. Dec. 652; *Everson v. Kirtland*, 27 Id. 91; *Sibley v. Spring*, 28 Id. 191; and a contract "to make a warranty deed free and clear of all incumbrances," is not satisfied by a deed of general warranty and freedom from incumbrances, unless the grantor has at the time a perfect and unincumbered title: *Porter v. Noyes*, 11 Id. 30. Though in *Parker v. Parmele*, Id. 253, it was held that a contract to give a good warranty deed of conveyance referred to the instrument, and not to the title. And in *Babcock v. Wilson*, 35 Id. 263, it was held that a contract to give a good and sufficient warranty deed of a certain individual's interest in a piece of land, does not require a warranty that such person's title is perfect.

INTENTION OF PARTIES SHOULD GOVERN IN CONSTRUCTION OF CONTRACT: *Kendall v. Russell*, 20 Am. Dec. 696; *Roberts v. Beatty*, 21 Id. 410; *Watson v. Blaine*, 14 Id. 669; *Singleton v. Carroll*, 22 Id. 95; *Frost v. Spaulding*, 31 Id. 150; though intention arising perhaps from ignorance, can never be available against an established rule of law, and the legal operation of his deed: *Jaham v. Morgan*, 23 Id. 361.

CASES
IN THE
COURT OF CHANCERY
OF
NEW YORK.

**CHAFFEE v. BAPTIST MISSIONARY CONVENTION OF
THE STATE OF NEW YORK.**

[10 PARGE'S CHANCERY, 85.]

ATTESTATION CLAUSE TO WILL, SHOWING COMPLIANCE WITH ALL LEGAL REQUISITES in its execution, is not absolutely necessary to its validity under the New York statute, but that fact may be proved by the witnesses, or presumed from circumstances, if the witnesses are dead or otherwise unable to testify.

ATTESTATION CLAUSE TO WILL IS NOT CONCLUSIVE EVIDENCE of compliance with legal formalities in its execution, as therein stated, but may be contradicted by the witnesses; but it is presumptive evidence of such compliance, if the witnesses are dead, or from lapse of time do not remember the facts.

STATUTORY REQUISITES IN EXECUTING WILL MUST BE SUBSTANTIALLY COMPLIED WITH to render it valid, and the *onus* to show such compliance is on the proponents of the will.

TESTATOR MUST SUBSCRIBE WILL AT END THEREOF IN PRESENCE OF EACH WITNESS attesting it, or must acknowledge to each witness that he has so subscribed it, to render it valid under the New York statute, but he may sign by making his mark, or another may subscribe his name in his presence and by his direction.

WHERE TESTATOR EXHIBITS WILL TO WITNESSES ALREADY SIGNED, and putting his finger on his name, acknowledges that it is his will, and requests them to attest it, but it is not shown that he signed the will in the presence of each of them, or acknowledged to them that he had so signed, or that another had done so for him, in his presence and by his direction, the will is invalid, although the attestation clause states that the will was signed in the presence of the witnesses.

PROPOSERS OF WILL SHOULD NOT BE CHARGED WITH COSTS, where it is declared invalid in the court of chancery, on appeal, on account of a technical defect in its execution, and they have litigated it in good faith.

CORRECT PRACTICE ON APPEALS FROM DECREES OF SURROGATES respecting the probate of wills in New York, stated by the chancellor.

APPEAL from the decision of a circuit judge, reversing a decree of a surrogate court against the validity of an alleged will of Hannah Chandler, whereby her estate was devised to the proponents. The appellants were next of kin. The will had the testatrix's name subscribed to it, and there was an attestation clause, certifying that the testatrix signed, sealed, delivered, and published the same as her will, in the presence of the witnesses, and that they subscribed their names as witnesses in her presence. It was not stated that the witnesses signed at her request. One of them testified, however, that such was the case, and the other could not remember. The witnesses testified that they went to the testatrix's room, at the request of the person (since deceased) in whose handwriting the will appeared to be; that the testatrix took the will from a drawer, already signed with her name, and putting her finger on her name, acknowledged the instrument to be her "last will and testament," but that she did not state that she subscribed her name to it, or that it had been subscribed by any other person in her presence by her direction. The will was then given to one of the witnesses for safe keeping. The witnesses did not know whether the testatrix could write or not. Certain papers were produced in evidence, however, which she had shortly before signed by making her mark. Other facts appear from the opinion.

G. F. Comstock, for the appellants.

J. F. Sabine, for the respondents.

WALWORTH, Chancellor. The return in this case is very imperfect, as it does not state who propounded the will before the surrogate, when the proceedings to prove it were instituted; who were ascertained by him to be the next of kin of the decedent, and which of them, if any, were infants, or were cited to attend upon the proving of the will; or who did, in fact, attend and litigate the will before him. All this should have appeared upon the return, to enable the circuit judge to know who were the proper persons to be made parties to the appeal to him: Laws of 1837, p. 525, secs. 5-10. The appellants also should have presented a petition of appeal to the circuit judge, naming, among other things, the persons who were interested in sustaining the decree of the surrogate, as the next of kin of the decedent; and making at least all of those who appeared before the surrogate in opposition to the appellants, parties to

such appeal. It should also pray that a day may be fixed for the persons thus made respondents, and the appellants, to be heard on such appeal; so that due notice of the hearing may be given to such of the parties as are entitled to appear to sustain the decision of the surrogate: 2 R. S. 608, secs. 93, 94. If either of the respondents is an infant, who has no general guardian, or whose general guardian has an adverse interest, the circuit judge should appoint a guardian *ad litem* to protect the rights of the infant on the appeal. And in the decree or order of the circuit judge affirming or reversing the sentence of the surrogate, or in the proceedings before him, which proceedings should be returned to the surrogate with his decision, so that they may be sent to this court if that decision is appealed from, it should be stated which of the respondents, named in the petition of appeal to the circuit judge, appeared before him; and it should also be stated that those who did not appear, were duly notified of the time and place of hearing, as directed by the statute.

Here the persons who were respondents before the circuit judge, are directed to pay the costs of the adverse party. But in the certificate and proceedings sent by the circuit judge to the surrogate, it does not appear who those respondents were, so as to enable the surrogate to carry into effect the decision of the appellate tribunal: 2 R. S. 609, sec. 97. The appellants in the court, however, have no right to complain that the decree of the circuit judge is so indefinite in this respect that it never can be enforced against them. And the conclusion to which I have come upon the merits of the case, renders it unnecessary that I should base the decision, which I make, upon any of these technical defects in the proceedings before the circuit judge, or on the defective return of the surrogate. For enough appears to show, that in point of law, the surrogate was right in supposing that the paper propounded was not executed in the manner prescribed in the revised statutes, so as to make it a valid will of either real or personal property in this state.

An attestation clause, showing upon its face that all the forms required by the statute have been complied with, is not absolutely necessary to the validity of a will; as the witnesses will be permitted to prove that the forms were in fact all complied with, although the attestation clause is silent on the subject. Indeed it has been decided that a formality of this kind, not noticed in the attestation clause, may even be presumed from circumstances after the witnesses to the will are dead: *Croft v. Pawlet*, 2 Stra

1109; *Brice v. Smith*, Willes, 1; *Hands v. James*, Com. 531. The statute does not require an attestation clause showing that the proper legal formalities were complied with; and although upon the face of the instrument those formalities are stated to have taken place, the fact may be disproved by the witnesses. But prudence requires that a proper attestation clause should be drawn, showing that all the statute formalities were complied with; not only as presumptive evidence of the fact in case of the death of the witnesses, or where from lapse of time they can not recollect what did take place, but also for the purpose of showing that the person who prepared the will knew what the requisite formalities were, and therefore gave the proper information to the testator, or saw that they were complied with if he was present. To impress the more strongly upon the memory of the witnesses the important fact that all the legal forms requisite to a due execution of the will were complied with, at the time when they subscribed their names as witnesses to such execution, the safer course always is to read over the whole of the attestation clause, in the presence and hearing of the witnesses, and of the testator. And where the person executing the will is not known to the subscribing witnesses to be capable of reading and writing, especially if he executes the will as a marksman, it would be proper that the whole will should be deliberately read over to him in the presence and hearing of the witnesses, and the fact of such reading in his presence should be stated in the attestation clause. Or at least the witnesses ought, by inquiries of the illiterate testator himself, to ascertain the fact that he was fully apprised of the contents of the instrument which he executed and published as his will, as well as that he was of competent understanding to make a testamentary disposition of his property. All these things, however, are matters of precaution and prudence, to prevent any well-founded doubt upon matters of fact; and where they are neglected it does not necessarily render the will invalid, if the court or jury which is to pass upon the question of its validity is satisfied, upon the whole evidence, that the will was duly executed, and that the testator understood its contents.

The legislature, however, has seen proper to prescribe certain legal requisites to the due execution of a will; all of which must be substantially complied with, or the will is void in law. And the *onus* of satisfying the court that these forms were complied with, lies upon the party seeking to establish the will. But the fact of such compliance may be proved by other evidence, or

inferred from circumstances, where the subscribing witnesses are dead, or absent, or otherwise incapacitated to give testimony; or where from lapse of time, or otherwise, they are unable to recollect whether the requisite formalities were observed at the time when they witnessed the execution of the instrument. The first of the legal forms required by the statute is, that the will shall be subscribed by the testator at the end thereof. And the second, which is equally imperative, is that such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses: 2 R. S. 63, sec. 40, sub. 2. It is not necessary that the testator should be able to write his name; for it has been determined that the making of his mark, by the testator, is a sufficient signing within the statute: 1 Rob. on Wills, 94; *Addy v. Grix*, 8 Ves. 504. The former statute required that the will should be signed by the testator, or by some other person in his presence and by his direction. And that the legislature did not intend to alter the law in that respect is evident from the fact that this mode of subscribing the testator's name, by the instrumentality of another person but by the testator's direction, is recognized in the forty-first section. There was no evidence here, however, that the name was subscribed to this testamentary paper by the direction of the testatrix, or even in her presence. And for aught that appears to the contrary, the will may have been brought to her precisely in the form in which it appeared when she took it out of the drawer. She did not admit to either of the witnesses that she had subscribed her name to the will, or say that any other person had written it there in her presence, or by her direction. On the contrary, one of the witnesses swears that he did not hear her say anything about who wrote the name; and the other says nothing on the subject. The attestation clause states that the will was signed by her in the presence of the witnesses; but this is contradicted by the testimony of both of these witnesses.

The putting her finger upon the part of the will where the seal was, and acknowledging that the instrument was her last will and testament, was merely a compliance with the directions of the third subdivision of the fortieth section, which required her to declare the instrument which she asked the witnesses to attest, to be her last will and testament. But it did not supersede the necessity of an actual subscription in the presence of the witnesses, or an acknowledgment to each of them that

she had previously subscribed it, or had directed some other person to sign it with her name, which appeared thereon. In *Remsen v. Brinckerhoff*, 26 Wend. 331 [37 Am. Dec. 251], Chief Justice Nelson, after stating the four requisites to a valid execution of a will, under the provisions of the fortieth section of the revised statutes on the subject, says: "It is obvious that any one of these four requisites, in contemplation of the statute, is to be regarded as essential as another; that there must be a concurrence of all to give validity to the act, and that the omission of either is fatal." And as the will in that case was pronounced invalid, although subscribed by the testatrix in the presence of the attesting witnesses, for want of due publication in their presence, so in this it must be declared not to have been duly executed, because it was not subscribed by her in the presence of the witnesses, as is erroneously stated in the attestation clause; and because there is no proof that she acknowledged in their presence that her name subscribed to it was put there by her, or by her direction, or in her presence.

I regret to be compelled to come to this conclusion in regard to this particular case. For the circumstances are such as to render it highly probable that the will had been drawn under the direction of the testatrix, and that her name had been put to it by her request after she had perfectly understood the contents of the will. She must likewise have supposed that the instrument which she acknowledged to be her last will and testament, and which she requested these witnesses to attest as such, was properly executed to carry into effect her pious and benevolent intentions in favor of the respondents, and of the other charitable institutions mentioned therein. And she may have had very good reasons for wishing to conceal from her brother-in-law, and his family, a knowledge of the fact that she was disposing of her property in this manner. But, as the requisites of the statute have not been complied with, this court can only pronounce the legal result of such non-compliance. It does not however appear to be a case in which a charitable society which has litigated in good faith, and has been defeated upon a technical objection as to the due execution of the will, should be charged with costs. But as the appellants have successfully contested the case for the benefit of themselves and the other parties who may be entitled as the next of kin of the decedent, they should not be permitted to bear the burden of the costs personally.

A decree must therefore be entered, reversing that of the cir-

cuit judge and affirming the sentence and decree of the surrogate; and directing the taxable costs of the appellants Chaffee and Chapman, both in this court and before the circuit judge, to be paid out of the estate of the decedent, when letters of administration shall have been granted thereon.

EXECUTION, PUBLICATION, AND ATTESTATION OF WILL: See *Russell v. Palls*, 1 Am. Dec. 380; *Swett v. Boardman*, 2 Id. 16, and note; *Eelbeck v. Granberry*, Id. 624; *Burwell v. Corbin*, 10 Id. 494, and note; *Pearson v. Wightman*, 12 Id. 636; *Edelen v. Hardey's Lessee*, 16 Id. 292; *Small v. Small*, Id. 253; *Howard's Will*, 17 Id. 60; *Higdon's Will*, 22 Id. 84; *Dewey v. Dewey*, 35 Id. 367, and note; *Guthrie v. Owen*, 36 Id. 311, and note; *Remsen v. Brinckerhoff*, 37 Id. 251, and note. To constitute a valid execution of a will under the New York statute, the testator must subscribe it at the end thereof in the presence of each of the attesting witnesses, or distinctly acknowledge in the presence of each of them that he has so subscribed it: *Van Hoozer v. Van Hoozer*, 1 Redf. 370; *Butler v. Benson*, 1 Barb. 530; *Sisters of Charity v. Kelly*, 67 N. Y. 413. But the testator may subscribe the will by making his mark, or another may sign for him in his presence and by his authority: *Simpson's Will*, 2 Redf. 32; *Robins v. Coryell*, 27 Barb. 559. So a witness may sign by making his mark: *Morris v. Kniffin*, 37 Id. 340. So it is a sufficient signing of other papers for the party signing to make his mark, or for another to subscribe his name in his presence and by his authority: *Barnard v. Heydrick*, 49 Id. 67; S. C., 2 Abb. Pr. (N. S.) 51; 32 How. Pr. 101. If a testator is unable to read or write, the will should be read to him in the presence and hearing of the witnesses, and that fact should be stated in the attestation clause, or the witnesses should at least satisfy themselves by inquiry, that he understands the provisions of the instrument, although these precautions are not absolutely necessary to a valid execution of the will: *Van Pelt v. Van Pelt*, 30 Barb. 139. If the testator, in addition to being illiterate, is also deaf and dumb, the proof that he understands the contents of the will at the time of its execution should be still more clear and satisfactory: *Rollwagen v. Rollwagen*, 63 N. Y. 518. Where the will has been already subscribed before being exhibited to the attesting witnesses, there must be a distinct acknowledgment of the signature, or that the testator executed the instrument, in the presence of each of the witnesses: *Lewis v. Lewis*, 13 Barb. 23; S. C., 11 N. Y. 220; *Willis v. Willis*, 36 Id. 492; *Mitchell v. Mitchell*, 16 Hun, 100. An acknowledgment which merely amounts to a declaration that the instrument is the testator's will is not sufficient, because that is merely a publication: *Lewis v. Lewis*, 13 Barb. 23; S. C., 11 N. Y. 220; *Mitchell v. Mitchell*, 16 Hun, 100. Especially where the paper is so folded that the witnesses can not see the testator's signature: *Lewis v. Lewis*, 13 Barb. 23; S. C., 11 N. Y. 220. But if the testator has personally signed the instrument by writing his name, and not merely by making his mark, and the witnesses see the signature, an acknowledgment by the testator that the instrument is his will, and a request to the witnesses to attest it, are held to constitute a sufficient acknowledgment of the subscription: *Robinson v. Smith*, 13 Abb. Pr. 363; *Baskin v. Baskin*, 36 N. Y. 419, distinguishing the principal case as one in which the testator's name appeared to have been written by another, the testatrix being unable to write. The publication of a will need not be in the precise words of the statute; equivalent words, or words and acts, will be sufficient: *Torrey v. Bowen*, 15 Barb. 308. In all the

foregoing cases, *Chaffee v. Baptist etc. Convention* is referred to and approved as an authority for the principles laid down.

PROOF OF WILL BY SUBSCRIBING WITNESSES: See *Jackson v. La Grange*, 10 Am. Dec. 237, and note; *Pearson v. Wightman*, 12 Id. 636; *Lindsay v. McCormack*, Id. 387, and note; *Welch v. Welch*, 15 Id. 126, and note; *Dan v. Brown*, Id. 395, and note; *Jackson v. Vickory*, 19 Id. 522; *Hawes v. Humphrey*, 20 Id. 481; *Scribner v. Crane*, 21 Id. 81; *Woodard v. Spiller*, 25 Id. 139; *Remsen v. Brinckerhoff*, 37 Id. 251, and note. To the point that where the attestation clause is full, if the attesting witnesses are dead, but their signatures and that of the testator are proved to be in their handwriting, or if from lapse of time the witnesses are unable to recollect the facts, a due compliance with all the statutory formalities in the execution of the will, as recited in the attestation clause, may be presumed, the principal case is cited in *Weir v. Fitzgerald*, 2 Bradf. 74; *Peebles v. Case*, Id. 240; *Moore v. Griswold*, 1 Redf. 390; *Norton v. Norton*, 2 Id. 12; *Rider v. Legg*, 51 Barb. 261; *Matter of Griswold*, 15 Abb. Pr. 300. Prudence, therefore, as stated in the foregoing opinion of the chancellor, requires that the attestation clause should be in proper form to show compliance with all the requirements of the statute: *Lawrence v. Norton*, 45 Barb. 452; S. C., 30 How. Pr. 236.

PRACTION ON APPEALS IN PROBATE CASES.—In *Mason v. Jones*, 2 Bradf. 329, the principal case is cited to the point that on an appeal from a surrogate to the circuit judge, respecting the probate of a will, notice need be given only to those who appeared in the court below. As to the power of the court of chancery and of the supreme court, as the successor to its jurisdiction, to declare a will valid or invalid on an appeal from a surrogate's court, the case is cited in *Mead v. Mead*, 11 Barb. 663; *Pilling v. Pilling*, 45 Id. 93.

PADGETT v. LAWRENCE.

[10 PAIGE'S CHANCERY, 170.]

OWNER OF LEGAL TITLE IS NOT ENTITLED TO INJUNCTION against ejectment to recover the land, because he has a perfect defense at law.

“**JUNIOR**” ANNEXED TO GRANTEE'S NAME in deed is no part of the name, but is descriptive merely, and in such a case, if there are three persons of the same name, grandfather, father, and son, the latter a minor of seven or eight years of age, and it appears that the father is known as “junior,” and that the original contract of sale was made with him, he will be deemed the party intended in the deed.

GRANTEE IN DEED TAKEN FOR PRIOR DEBT IS NOT DEEMED BONA FIDE PURCHASER, entitled to protection against trusts of which he had no notice; but it is otherwise if he releases a valid security for such prior debt, and can not be replaced in his former situation as to security.

DECLARATIONS OF FORMER OWNER RESPECTING HIS INTEREST are generally admissible against those claiming under him by title subsequent; but his declarations after parting with his interest, or which are overreached by the purchase of one claiming under him, are not admissible; as where the declarations are made after the docketing of a judgment against such former owner, and are offered in evidence against a subsequent purchaser under the judgment.

DECLARATIONS OF THIRD PERSON RESPECTING TITLE to land are not admissible to establish or destroy the title, or to prove or disprove a trust in the land, unless made in the presence of the holder of the legal title, and expressly or tacitly assented to by him.

TRUST RESULTING FROM PAYMENT OF CONSIDERATION BY THIRD PERSON on a purchase of land, results only in favor of such person, and descends to his heirs, and does not inure to the benefit of one for whom the purchase might have been intended to be made.

BILL for an injunction, to restrain an action of ejectment brought by the defendants to recover a certain lot, known as the "Carson lot." At the hearing before the vice-chancellor, it appeared that in 1809 one Livingston, then owner of the lot, by his agent, Morris, contracted for the sale thereof, to one Walker, a conveyance to be made on payment of the purchase money. Subsequently John Padgett, the complainant's father, made a parol agreement with Walker to take the contract off his hands and to pay him what he had already paid on the land, as well as to pay the amount still due to Livingston. The contract was accordingly delivered to Padgett, and he went into possession and made some improvements. In January, 1816, Padgett delivered to Livingston's agent a draft on England, drawn by Hannah Padgett, his mother, in his favor, for a sum sufficient to cover the purchase money and interest, with the exception of a small portion of interest accrued on interest already due and unpaid, for which balance of interest Padgett gave his note in 1824, to Morris, the agent of Livingston's executors, which the latter indorsed on the contract with a memorandum to the effect that a conveyance was to be made when the note was paid. The note being unpaid, Livingston's executors recovered judgment thereon in June, 1826, against the complainant's father. Prior to this, in May, 1816, the executors, under a power in the will, executed a conveyance to "John Padgett, jun., of Oxford," and placed it in the hands of Morris, to be delivered on payment of the balance of the purchase money. It appeared that at that time there were three John Padgetts in Oxford, the complainant, who was then eight years old, his father, and his grandfather, who was old and blind and did no business. The complainant's father, on June 16, 1826, confessed a certain judgment to Farnham, one of the defendants, which was docketed the next day. In the following December, Farnham, in pursuance of an arrangement with the complainant's father, took an assignment of Livingston's judgment, upon payment of the amount to Morris, who delivered to him the deed in his hands, which was then recorded. In May, 1829, Farnham, having pre-

viously issued execution on the judgment confessed to him, purchased the lot at a sale thereunder and received the sheriff's deed after the expiration of the time for redemption. He subsequently conveyed, with warranty, to the other defendants, who took possession and continued therein by their tenant until the latter abandoned the premises under a threat of litigation from the complainant, who then took possession. The defendants then brought ejectment, and the complainant filed this bill. Certain declarations of the complainant's father and grandmother, Hannah Padgett, were introduced in evidence, to show that the latter advanced the money to pay for the land, under an agreement that the conveyance was to be taken in the complainant's name, and for his benefit. The bill also alleged that the complainant was known at the date of the deed as John Padgett, junior. The answers denied these allegations. Other facts appear from the opinion. The vice-chancellor decreed, among other things, that the defendants took only such interest as the complainant had at the docketing of Farnham's judgment; that the complainant was the grantee described in the deed, he being "John Padgett, jun., of Oxford;" and that his father and those claiming under him were estopped from denying this fact, and that if the deed should be deemed to have been made to the father, he, and those claiming under him, took as trustees for the complainant. Decree, that the defendants release their interest to the complainant, and for a perpetual injunction of the proceedings at law. The defendants appealed.

James Clapp, for the appellants.

H. Vanderlyn, for the respondent.

WALWORTH, Chancellor. If the vice-chancellor was right in the conclusion at which he arrived in the first branch of the decree in this case, that the complainant was the nominal grantee in the deed from the executors of Livingston, and that the legal title did not pass to the father of the complainant subject to a trust resulting by implication of law, the bill should have been dismissed. For in that case the complainant had a perfect defense to the suit at law which had been brought against him by Lawrence and Keese; and he had no right to come into this court, for an injunction, to deprive them of their legal right to a trial by jury to determine the question of fact whether the complainant or his father was the grantee in the deed of May, 1816. I think, however, the vice-chancellor arrived at the wrong conclusion upon this question of fact; and that if the complainant

has any right to the premises in controversy it must be upon the ground of a trust arising in his favor by operation of law.

The description of the grantee in the deed, in this case, has reference to the time when it was dated and acknowledged, and was placed in the hands of Morris, the agent, to be delivered when the small balance of the purchase money then estimated as due should be paid. And if the father of the complainant was the person intended, by the description of "John Padgett, junior, of Oxford," at the date of the deed in May, 1816, he was still the grantee at the time it was actually delivered to the defendant Farnham, for him, ten years afterwards; although the elder John Padgett, of Oxford, had died in the mean time. The word junior forms no part of the name of the grantee, but is merely descriptive of the person; and is usually adopted to designate the son where the father bears the same Christian name as well as the family name. Where the word junior is left out, it is only presumptive evidence that the oldest person of the name, and who will answer the other matters of description in the deed, was the grantee intended; and the presumption may be rebutted by showing that the grantor intended to convey to the son by the name and description contained in the deed: *Lepiot v. Browne*, Holt, 41; S. O., 6 Mod. 198; *People v. Collins*, 7 Johns. 549; *Kincaid v. Howe*, 10 Mass. 203. Here the name and description of the grantee to whom the deed was to be delivered, and in whose favor the grantors intended it to operate as a conveyance of the legal title to the premises in question, was undoubtedly derived from Morris, their agent, at the time he remitted the draft on England. And they probably intended to convey to the person whom he then represented to them as having become entitled to Walker's interest in the premises, under the contract of 1809. To ascertain who that was, we must resort to Morris' testimony and to the facts then within his knowledge.

The evidence on the part of the defendants clearly shows that the father of the complainant was known as John Padgett, junior, long after the elder John Padgett had become blind and discontinued business. And he was sued by that name and description in 1815, in which suit the judgment upon the report of referees was entered in February, 1816. Morris also says that when Padgett came to him with Walker's contract, which was in January, 1816, he told him he had a father living, whose name was John, and had a son of the same name. And if the subsequent declaration of Morris to Walker could be received as evi-

dence, it would show that he must have been requested at that time to send for the deed in the name of John Padgett, junior. That the person who gave that direction understood the designation of junior as applying to himself, at that time, is shown by the fact that he had, on a former occasion, refused to answer to the name of John Padgett; insisting that he was John Padgett, junior. It is wholly improbable therefore that he would have requested to have the deed in the name of John Padgett, junior, or that Morris would have directed it to be made in that name, without any other designation, at the time this bill of exchange was delivered in January, 1816, if either of them had then understood that the conveyance was to be made to the complainant; who was then but seven or eight years old. The receipt for the draft on England, which was given at that time, also shows who was understood by all parties to be John Padgett, junior. For that receipt shows that the draft, which the complainant's father received and negotiated to Morris, was drawn in favor of the person to whom the receipt was given; who is therein designated by the addition of junior to his name. And no one can for a moment suppose that the bill of exchange was made payable to the infant John Padgett, and not to his father. I think there is very little room to doubt, therefore, that Morris was requested at that time to send for the deed to be made out to John Padgett, junior; and that it was then intended that the complainant's father should be the grantee in the deed by that description. That Morris must so have understood it is evident from another fact which occurred before any controversy had arisen on the subject. I refer to the indorsement made upon the contract, in May, 1824, when the complainant's father, who had then become John Padgett the elder, gave his note for the balance which was then due. In that indorsement the addition of junior is no longer retained; but it is stated that when the note shall be paid a deed will be delivered to John Padgett or his assigns. And it must also be recollected that Morris then had in his possession the deed to the complainant's father, which had been made out to him eight years before, with the addition of junior to his name, and ready to be delivered when the note for the balance of the purchase money should be paid. And this was the deed which was actually delivered to John Padgett, or to Farnham for him and with his assent, in December, 1826. Upon the whole evidence in the case, therefore, I have arrived at the conclusion that the father of the complainant was understood and intended to be the grantee of the premises, in the deed of May,

1816, by the name and description of John Padgett, junior, of Oxford; and for whom that deed was subsequently delivered to Farnham, by the direction of Morris, under the arrangement testified to by Colonel Clapp. The legal title to the land therefore was in the complainant's father at the time of the sale of the premises by the sheriff, and passed to Farnham under the sheriff's deed.

At the time of the purchase of the premises by Farnham, at the sheriff's sale, the judgment of June, 1826, was a legal lien upon the equity of redemption of the complainant's father in the old farm. And it appears from the testimony that the value of that farm, at the time of the foreclosure of the mortgage thereon to Walker, was much greater than the amount due on that mortgage. But the judgment of Farnham having been discharged of record, by the sale on the execution, the foreclosure would cut off the lien of that judgment upon the equity of redemption in the old farm. Farnham therefore probably lost his security for his debt by purchasing the Carson lot at the sheriff's sale. I am not, therefore, prepared to say that he and those claiming under him might not have claimed protection, as *bona fide* purchasers, if they had set up that defense in their answers, even if a resulting trust is established by the testimony. As a general rule, a purchaser of the legal title, who receives his conveyance merely in consideration of a prior indebtedness, is not entitled to protection; because he has lost nothing by the purchase. But the relinquishment of a valid security, which he before held for his debt, and which can not be revived so as to place him in the same situation substantially as to security as he was in prior to his purchase, may of itself be sufficient to entitle him to protection as a *bona fide* purchaser.

Upon the question whether a resulting trust is established in this case, it may be necessary to advert to the testimony as to the declarations of the complainant's father, and grandmother, for the purpose of seeing how far those declarations were admissible in evidence. As a general rule, declarations made by a person in possession of real estate, as to his interest or title in the property, may be given in evidence against those who subsequently derive title under him; in the same manner as they could have been used against the party himself if he had not parted with his possession or interest. On the other hand it is equally well settled that no declarations of a former owner of the property, made after he had parted with his interest therein, or which are overreached by the purchase of the party claiming

through or under him, can be received in evidence to effect the legal or equitable title to the premises: 1 Cowen & Hill's Notes to Ph. Ev. 644, 655. Here the title of the defendants relates back to the docketing of the justice's judgment, in June, 1826; or rather to the time of the delivery of the deed from Livingston's executors to Padgett, on the fourteenth of December thereafter, when that judgment became a lien upon the legal title of Padgett in the premises. And all declarations or admissions made by him subsequent to that time, either in favor of or against the validity of the title acquired under the deed of May, 1816, must be rejected as illegal and improper evidence.

The declarations or admissions of third persons are not legal evidence to establish or destroy a title to land, or to prove or disprove the existence of a trust, except as against those who have derived title to the premises in controversy from the persons making the declarations or admissions, and by a title subsequent. All the declarations of Hannah Padgett, therefore, which were not made in the presence of her son and either actually or tacitly assented to by him, should be rejected as illegal and improper evidence to prove the existence of any fact in this case. And after rejecting the admissions and declarations which ought not to have been received, there is not sufficient evidence in this case to satisfy me of the actual existence of a trust arising out of any valid agreement between Hannah Padgett and her son. The mere payment of the money by her would not raise a trust by implication, in favor of a third person, without the existence of an actual and binding agreement on the part of her son to transfer his interest in the land to the complainant and to take a conveyance therefor in his name. A trust resulting from the mere payment of the money by Hannah Padgett, would be a resulting trust in her favor; which trust, upon her death, would have descended to her children, and not to the complainant.

It is always unsafe to rely upon the uncertain recollections of a witness as to the existence of a contract, or agreement, which is to impair the title to real estate. And it may be remarked in this case, that although Walker recollects very distinctly the conversation which he had with Hannah Padgett from twenty to twenty-five years previous to the time when he was called upon as a witness, he is unable to tell whether that conversation took place before or after the death of her husband; though he thinks it was afterwards. If he is right in this last supposition, I am satisfied this decree can not be sustained. For his testimony would in that case directly contradict the allegation in

the bill, that the bill of exchange on England was given for the purpose of carrying into effect the supposed agreement attempted to be proved by Walker and his wife. And it must be recollected that nothing was ever paid upon the contract, after the drawing of that bill of exchange in January, 1816, until several years after the death of Hannah Padgett; when the defendant Farnham paid the judgment against her son, and took an assignment of it. No trust by implication of law, therefore, could arise out of a mere promise on the part of Hannah Padgett, to Walker, to pay the balance due on the contract which remained unpaid at the death of her husband, in 1817.

The testimony of Walker and wife, to whatever time it relates, does not prove the agreement stated in the bill. Walker says he first applied to Padgett, who said he could not pay, but he did not know but his mother would; not that Padgett authorized the witness to contract for a surrender of his interest in the contract to her. The witness then went to see her, but not in company with her son, and she promised Walker that she would pay for the land and take a deed for little John. That conversation, therefore, created no trust; nor did it constitute an agreement on the part of the complainant's father to relinquish his interest in the contract and to give up the land to his son. And the testimony of the complainant's sister, as to what occurred in 1821, even if the witness' recollection could be relied upon as to a conversation which occurred eighteen years before, when she was a mere child, does not establish the agreement set out in the complainant's bill. Padgett had probably at that time become embarrassed, and his mother was unquestionably solicitous to have him take the conveyance in the name of his son, so as to secure the property to the latter. But the testimony is altogether too loose and vague to justify this court in declaring a resulting trust, which is to unsettle the title to real estate after all the parties are dead who could explain the real facts of the case. I may also remark, that the testimony of the uncle of the complainant, as to Hannah Padgett's want of pecuniary means for some time previous to her death, renders it highly improbable that she should, in 1821, have furnished the money to pay off what was then due on the contract. The more rational conclusion is, that the son applied to her for the loan of a small sum, and that she took that occasion to urge him to secure the farm for the grandson, by taking a deed in his name; and that he replied, "Well," to put an end to importunity on that subject.

The fact that there was no attempt to set up this claim in the life-time of the complainant's father, although he lived between five and six years after possession of the Carson lot was taken under the sheriff's deed, and after the complainant became of age in 1829, is also a very strong circumstance against the probable justice of the claim which was subsequently set up. I have not, therefore, found sufficient legal testimony in this case to sustain a decree establishing a resulting trust in favor of the respondent. And as the whole of the decree appealed from is erroneous, it must be reversed; and the bill must be dismissed with costs.

"JUNIOR" IS NO PART OF A PERSON'S NAME IN LAW: *Johnson v. Ellison*, 16 Am. Dec. 163; *Brainard v. Stilphin*, 27 Id. 532, and note. To the same effect are *Goodhue v. Berrien*, 2 Sandf. Ch. 633; *People v. Cook*, 14 Barb. 300; *Farnham v. Hildreth*, 32 Id. 280. The word "junior" is generally used merely as a descriptive term to distinguish a son from his father where both have the same name, and its omission does not invalidate any act or grant, and affords merely presumptive evidence that the father and not the son was intended: *People v. Cook*, 14 Barb. 300; *Farnham v. Hildreth*, 32 Id. 280; *Graves v. Colwell*, 90 Ill. 615. So a designation of the place of residence affixed to a party's name is no part of the name, but is merely matter of description: *Carleton v. Townsend*, 23 Cal. 222.

CREDITOR TAKING CONVEYANCE OR ASSIGNMENT FOR PRIOR DEBT NOT A BONA FIDE PURCHASER entitled to protection against secret equities: See *Lockwood v. Bates*, 12 Am. Dec. 121; *Dickerson v. Tillinghast*, 25 Id. 523, and note; *Donaldson v. Bank of Cape Fear*, 18 Id. 577; *Harris v. Horner*, 30 Id. 182. That an assignee for benefit of creditors is not a *bona fide* purchaser who will be protected against equities of which he has no notice, see *Willis v. Henderson*, 38 Id. 120, and cases cited in the note thereto. That a conveyance in payment or security of a pre-existing debt does not constitute the grantee a *bona fide* purchaser who will be so protected, is held, citing the principal case, in *Barnes v. Camack*, 1 Barb. 398; *Peck v. Mallams*, 10 N. Y. 545; *Weaver v. Barden*, 49 Id. 292. But relinquishing a valid security is a new consideration, which will be sufficient to make such grantee a *bona fide* purchaser: *Hammond v. Bush*, 8 Abb. Pr. 168; *Wearer v. Barden*, 49 N. Y. 292.

INJUNCTION NOT GRANTED WHERE THERE IS ADEQUATE REMEDY AT LAW: See *Fentress v. Robins*, 7 Am. Dec. 704; *Brown v. Haff*, 23 Id. 425. In *Robeson v. Pittenger*, 32 Id. 412, it is held that interference by injunction where there may exist a remedy at law is a matter, the policy of which in a court of equity, must depend upon the particular circumstances of each case.

DECLARATIONS OF FORMER OWNER OR POSSESSOR, admissibility of, against those claiming under him: See *Jackson v. Bard*, 4 Am. Dec. 267; *Dorsey v. Dorsey*, 6 Id. 506; *Jackson v. McCall*, Id. 343; *Little v. Libby*, 11 Id. 63; *Johnson v. Patterson*, Id. 756; *Strickler v. Todd*, 13 Id. 649; *Babb v. Clemson*, Id. 684; *Jackson v. Davis*, 15 Id. 451; *Reading v. Weston*, 18 Id. 89; *Norton v. Pettibone*, Id. 116, and note; *Stockett v. Watkins*, 20 Id. 438; *Corbin v. Jackson*, 28 Id. 550; *Sumner v. Murphy*, 27 Id. 397; *Deming v. Carrington*, 30 Id. 591, and note; *Beecher v. Parmele*, 31 Id. 633; *Bird v. Smith*,

34 Id. 483; *Carpenter v. Hollister*, 37 Id. 612. That such declarations are admissible is held, citing *Padgett v. Lawrence*, in *Harrington v. Slade*, 22 Barb. 165; *Vrooman v. King*, 36 N. Y. 482; *Chadwick v. Fonner*, 6 Hun, 545.

DECLARATIONS OF GRANTOR AFTER CONVEYANCE, inadmissibility of, against his grantee, or those claiming under him: See *Barrett v. French*, 6 Am. Dec. 241; *Drum v. Simpson*, Id. 490; *Brashear v. Burton*, Id. 634; *Hatch v. Straight*, 8 Id. 152; *Jackson v. Miller*, 12 Id. 316; *McWilliams v. Martin*, 14 Id. 688; *Sharp v. Wickliffe*, Id. 37; *Osgood v. Manhattan Co.*, 15 Id. 304; *Chess v. Chess*, 21 Id. 350; *Doe v. Moore*, 30 Id. 666; *Wilson v. Woodruff*, 31 Id. 194; *Felder v. Bonnett*, 37 Id. 545. That one who has parted with his interest can not affect his grantee, or any one claiming through him, by his subsequent declarations, is a point to which the principal case is cited in *Vrooman v. King*, 36 N. Y. 482, and *Potter v. Clark*, 12 How. Pr. 118.

DECLARATIONS OF THIRD PERSON NOT EXPRESSLY OR IMPLIEDLY ASSENTED TO by a party, are not evidence against him: *Craig v. Craig*, 24 Am. Dec. 390.

RESULTING TRUST IN FAVOR OF PARTY PAYING CONSIDERATION on a purchase in another's name: See the note to *Weeks v. Haas*, 39 Am. Dec. 46, collecting the previous cases in this series on that point.

KNAPP v. ALVORD.

[10 FAIRBANKS' CHANCERY, 205.]

PRINCIPAL'S DEATH DOES NOT REVOKE AGENT'S AUTHORITY COUPLED WITH INTEREST. Hence, where a tradesman gives his agent possession and control of his property, with a written power of attorney, authorizing him to take the entire management of his business, and, if necessary, to sell any or all of the property, for the purpose of paying certain notes indorsed by the agent and others, the power of sale, being coupled with the agent's interest as indorser, may be exercised after the principal's death.

INSTRUMENT CREATING EQUITABLE LIEN ON CHATTELS NEED NOT BE RECORDED in New York, under the act of 1833, where it is accompanied by an actual delivery and continued change of possession of the property.

FACTOR HAS LIEN OR RIGHT OF RETENTION FOR GENERAL BALANCE due from his principal, on the property in his hands.

EXCEPTIONS to master's report, stating the account of the defendant as administratrix of Alvord, deceased, filed by certain creditors of the estate. The estate was insufficient to pay all the debts, and the master allowed the administratrix, for a certain sum, retained by one Meads out of the proceeds of the property of the estate sold by him, to cover two notes on which he was indorser for the deceased. It appeared that the deceased, who was a cabinetmaker, wishing to go abroad for his health, gave Meads, who was his indorser on a certain note to one Rector, the general management of his business, and entire possession and control of his property, with a written power of attor-

ney, authorizing him to conduct the business, to purchase stock, to hire hands, and to collect moneys and apply the same in the business and to the support of the principal's family, etc.; and expressly empowering him to sell and dispose of any or all of the property "at any time or in any manner" which he might deem advisable, and apply the proceeds, in whole or in part, to the payment or security of a certain note indorsed by Whitney and Van Vechten, or any note given in renewal thereof, and to the payment or security of any of his notes indorsed by Meads, or for which Meads might become responsible. He also left with him certain notes signed in blank, to be used in renewal of notes. He gave Whitney also a mortgage on the furniture, stock, etc., of his cabinet shop, to secure the note on which he was indorser, but the same was not recorded until after Alvord's death. Before Alvord's death, Meads renewed the Whitney & Van Vechten note with one of the blanks in his hands, they again indorsing, and also renewed the Rector note, putting his own name as indorser on both notes, and they being protested for non-payment after Alvord's death, he took them both up. He claimed a lien to reimburse him for the moneys so paid, on the property in his hands, of which he kept possession, and continued to manage the business, with the consent of the administratrix, until 1838, when, with the like assent, he sold the property at auction, and, retaining enough to reimburse him, paid the proceeds to the defendant.

Ira Harris, for the excepting creditors.

S. Stevens and O. Meads, for the defendant.

WALWORTH, Chancellor. The personal mortgage to Whitney not being filed till after the death of Alvord, and not being accompanied by an immediate delivery and continued possession of the property, it may be doubtful whether it was sufficient to give Whitney, who was liable to Meads as the last indorser of the note of one thousand eight hundred dollars, a preference in payment over the other creditors of Alvord. This case, however, does not turn upon that question; as I am satisfied that an equitable lien upon the property was created by the special clause in the power, in reference to the one thousand eight hundred dollar note, and to notes drawn by Alvord and indorsed by Meads. And as that instrument was accompanied by an actual delivery and continued change of possession of the property, until it was converted into money and applied in payment of the two several notes, it was not necessary that the instrument which created

that lien should be recorded, under the act of 1833. It is the duty of the court to give such a construction to the language of a written instrument as to carry into effect the intention of the parties, so far as that intention can be collected from the whole instrument and the situation of the parties at the time the writing was executed. And I think no one who reads this special clause in connection with the evidence, or rather the admissions, of extrinsic facts which are proper to be taken into consideration, can believe that Alvord did not intend to give to the indorsers of the one thousand eight hundred dollar note, and to Meads, as the indorser of the Rector note, and other notes which he might thereafter indorse, a beneficial interest in the execution of this power, for their security and indemnity. It clearly shows that Alvord anticipated that it would probably be necessary for Meads to incur further responsibility, as his indorser, in the discharge of the duties of his agency, and that something more than an ordinary power of attorney was necessary to protect him from loss. And as the possession of the property was delivered to Meads, in connection with this power to dispose of it for the security and protection of himself and the other indorsers, the property must be considered as pledged to him for that purpose. The power to sell, therefore, was coupled with an interest in the property thus pledged, and survived: *Bergen v. Bennett*, 1 Cal. Cas. in Err. 1 [2 Am. Dec. 281]; *Raymond v. Squire*, 11 Johns. 47. In the case decided by the supreme court of the United States, *Hunt v. Rousmanier*, 8 Wheat. 174, there was no actual pledge of the property. But a mere power of attorney was executed authorizing the plaintiff to transfer it in the name of Rousmanier. It was upon that ground, as I understand the case, that Chief Justice Marshall held that the power was not coupled with any interest in the vessels. And I presume his opinion upon that point would have been different if the power had been accompanied by an actual delivery of the vessels as a pledge for the payment of the debt. But even in that case the court protected the rights of Hunt as an equitable mortgagee of the vessels; though the decision was placed on the debatable ground that a party may be relieved in equity against a mistake of law merely.

Being satisfied that Meads had a lien upon the property in his hands, and a right to retain for the amount of these notes, under the special clause in the written power executed by Alvord, it is not necessary to inquire whether he is not also to be considered as the factor of Alvord; so as to entitle him to retain for

his advances and liabilities, entirely independent of this special provision in the power of attorney to him. If the arrangement between Alvord and Meads gave to the latter the character of a factor, there can be no doubt as to his lien upon the property in his hands, and his right to retain for all his advances and responsibilities in the business with which he was intrusted by his principal. Although it was doubted, previous to the case of *Kruger v. Wilcox*, Amb. 252, it is now well settled that a factor has a lien and may retain for a general balance; including responsibilities incurred in the execution of his agency: Whit. on Lien, 103; 2 Kent's Com. 640; Story on Agency, 34, sec. 34. And the case of *Foxcraft v. Wood*, 4 Russ. 487, was probably decided upon the ground that the arrangement under which the business at Birmingham was carried on constituted Foxcraft the factor of Lanning, although he received a fixed salary instead of the usual mercantile commissions for his services.

The decision of the master was right in allowing to the administratrix the amount retained by Meads for the two notes. The exceptions are therefore overruled with costs, and the report of the master is confirmed.

FACTOR'S LIEN: See *Holbrook v. Wight*, 35 Am. Dec. 607, and the note thereto, collecting the previous cases in this series on that subject. See also *McKenzie v. Nevius*, 38 Id. 291, and note. That a factor has a lien on the property of his principal in his hands to cover a general balance due from the principal is held, citing *Knapp v. Alvord*, in *Myer v. Jacobs*, 1 Daly, 33. So an attorney's lien on the papers in a suit extends to a balance due from his client for other professional services: *Bowling Green etc. Bank v. Todd*, 52 N. Y. 491.

PRINCIPAL'S DEATH REVOKES AGENCY, WHEN: See *Cassiday v. McKenzie*, 39 Am. Dec. 76, and the note thereto discussing this subject at length. That an authority coupled with an interest in the subject-matter is not revoked by the principal's death, is held, on the authority of *Knapp v. Alvord*, in *Houghtaling v. Marvin*, 7 Barb. 414. Much less can such an authority be revoked by the principal in his life-time, as where a power is given by a debtor to his creditor, by way of security, to appropriate particular property or a particular fund to the payment of the debt: *Beecher v. Bennett*, 11 Id. 380; *Hutchins v. Hebbard*, 34 N. Y. 27.

MORGAN v. NEW YORK ETC. R. R. Co.

[10 PAIGNE'S CHANCERY, 290.]

JUDGMENT CREDITOR OF INSOLVENT CORPORATION OBTAINS NO PREFERENCE by filing a creditor's bill against it after the return of his execution unsatisfied, under the New York revised statutes, and the final decree obtained is not only for his benefit, but also for that of all other creditors who

may prove their claims under it, or under any prior order, and the effects are to be distributed ratably among such creditors, giving no preferences except such as exist under the laws of the United States, or by virtue of liens or docketed judgments and decrees.

JUDGMENT CREDITOR OF INSOLVENT CORPORATION MAY FILE EITHER BILL OR PETITION, under 2 N. Y. R. S. 463, sec. 36, after the return of his execution unsatisfied, to obtain a sequestration of its effects, and a bill is the proper mode of proceeding where he wishes to charge the directors and stockholders personally if the corporate property should be insufficient.

STOCKHOLDERS OF INSOLVENT CORPORATION ARE LIABLE FOR ITS DEBTS, under the New York revised statutes, to the extent of what remains unpaid on their shares of capital stock, or of such proportion thereof as may be necessary to satisfy the debts, and a judgment creditor whose execution has been returned unsatisfied may compel a discovery of the names of such stockholders, and the amounts unpaid on their shares, and may then amend his bill so as to make them parties, or may, after a decree against the corporation and a distribution of its effects, file a supplemental bill against such stockholders.

RECEIVERSHIP OF INSOLVENT CORPORATION SHOULD EXTEND TO ALL ITS PROPERTY, where a receiver is appointed on a bill filed by a judgment creditor, under the New York revised statutes; but the corporation can not complain of an order appointing a receiver of so much property only as is necessary to satisfy the complainant's debt, where it does not appear that there are any other debts.

INJUNCTION DEPRIVING OFFICERS OF CORPORATION of the control of all its property should not be granted, *ex parte*, on the certificate of a vice-chancellor or injunction master out of court.

ORDER APPOINTING RECEIVER OF INSOLVENT CORPORATION for the purpose of winding up its affairs, should contain a clause restraining its officers from collecting the debts or paying away or transferring the assets.

CREDITOR's bill, filed by a judgment creditor of the corporation defendant, after a return of his execution unsatisfied, to obtain satisfaction out of its property. The president of the corporation was also made a defendant, and a discovery from him was prayed as to the names of the stockholders who had not paid up their shares and as to the amounts unpaid, it being alleged in the bill that there were large amounts remaining unpaid on stock which should be applied to the complainant's demand, and that the president refused to give the information required. The vice-chancellor appointed a receiver of so much of the corporate property as should be necessary to satisfy the complainant's judgment, and the defendants appealed.

J. V. L. Pruyn, for the appellants.

D. D. Field, for the respondent.

WALWORTH, Chancellor. The counsel for the complainant is in an error in supposing that this is a case in which a judgment cred-

itor can obtain a preference in payment, out of the effects of an insolvent corporation, under the provisions of the revised statutes. The word defendant in the thirty-eighth section of the title relative to the court of chancery, 2 R. S. 173, would undoubtedly include a corporation as well as an individual, if the rights of creditors as against corporations, upon the return of an execution unsatisfied, were not otherwise provided for in the revised statutes. But the legislature, in the act of April, 1825, to prevent fraudulent bankruptcies by incorporated companies, to facilitate proceedings against them, and for other purposes (Laws of 1825, p. 449, sec. 5), adopted the principle, as to insolvent corporations, that equality among creditors is equity; and directed that upon the return of an execution unsatisfied, the property and effects of the corporation should be sequestered and distributed equally, and in a just proportion, among all the creditors of the company. And this provision of the act of 1825 was re-enacted, substantially in the same form, in the thirty-sixth and thirty-seventh sections of the article of the revised statutes relative to proceedings against corporations in equity: 2 R. S. 463. The manner in which the effects of the corporation are to be distributed after a decree in the suit, is the same as is prescribed by the seventy-ninth section of the article relative to the voluntary dissolution of incorporations: 2 Id. 471; that is, by giving no preferences, except such as are created by the laws of the United States, and such as have been acquired by the docketing of a judgment, or decree, so as to create a lien upon the real estate of the corporation.

The final decree, which is to be obtained upon a bill filed by a judgment creditor of the corporation, under this thirty-sixth section of the article relative to proceedings against corporations in equity, is therefore a decree not only for the benefit of the complainant in the suit, but also for the benefit of all other creditors of the corporation who may come in and prove their debts, under such decree, or under an order of the court made previous to such decree, as authorized by the fifty-sixth section of the same title: 2 R. S. 466. And the order appealed from should have extended the receivership to all the property and effects of the corporation, instead of limiting it to so much of such property and effects as would be sufficient to pay the debt and costs of the complainant merely.

In all other respects, however, I do not perceive why the order appealed from is not a good appointment of a receiver, for the purpose of sequestering the property of the corporation,

under this thirty-sixth section of the article relative to proceedings against corporations in equity. The bill, it is true, contains some allegations which were not necessary to be stated therein under this section; and which are only required by the one hundred and eighty-ninth rule of this court. But the provisions of that rule, although they were only intended to cover the case of an ordinary creditor's bill against natural persons, are broad enough to reach the case of a bill filed by a creditor of a corporation, under this thirty-sixth section, after the return of an execution unsatisfied. And there is nothing in that, or in the three succeeding rules, which is inapplicable to a creditor's bill filed against a corporation, after the return of an execution unsatisfied, where the final decree upon such bill is to be for the benefit of other creditors of the corporation, as well as of the complainant.

The word petition only is used in the thirty-sixth section. But every bill in chancery is in fact a petition to the court for relief. In the recent case of *Judson v. The Rossie Galena Company et al.*, 9 Paige, 598 [38 Am. Dec. 569], I came to the conclusion that a suit might properly be commenced against a corporation, under that section of the revised statutes, by bill as well as by petition; and that a proceeding by bill is the most proper mode of commencing the suit, where the complainant intends to proceed against the directors or stockholders of the corporation, to charge them personally, in case the corporate property and effects should be found to be insufficient to pay all of the debts and liabilities of the corporation. Indeed the forty-fifth section of that article of the revised statutes expressly recognizes the filing of a bill, against the directors or stockholders, as well as against the corporation, whenever the creditor whose execution has been returned unsatisfied seeks to charge such directors, or stockholders, on account of any liability created by law.

In the case under consideration it is expressly charged, in the bill, that there are stockholders of the corporation who have not paid in the full amount of their stock, but whose names are unknown to the complainant; and he prays for a discovery of the names of such stockholders and the amount due upon their stock. The fifth section of the title of the revised statutes relative to the powers, privileges, and liabilities of corporations, 1 R. S. 600, renders such stockholders liable to the creditors of the corporation, to the extent of what remains unpaid upon their respective shares of the capital stock of the company, or

of such proportions thereof as may be required to satisfy the debts of the corporation. The complainant, therefore, when he shall have obtained a discovery of the names of the stockholders who have not paid in the whole nominal amount of their respective shares of the stock of the corporation, as fixed by the charter of the company, will have the right to amend his bill; for the purpose of making them parties, to enforce their liability for the deficiency, to the extent prescribed by the statute, if the property and effects of the corporation shall not be sufficient to pay and discharge all its debts. Or he may wait until a final decree has been rendered against the corporation, and the corporate effects have been distributed according to law, and may then file a supplemental bill, against such stockholders, to compel them to pay in the amount due upon their respective shares of the capital stock, or so much thereof as may be necessary to satisfy the residue of the debts of the company: 2 R. S. 465, sec. 49.

In this case, the order for the appointment of a receiver was properly granted; but it was erroneous not to extend the receivership to all the corporate property and effects. It does not appear, however, from any of the papers which were before the vice-chancellor, that the company owed any other debts except the complainant's judgment. The appellants can not complain, therefore, that the whole property has not been taken from the corporation and placed in the hands of a receiver. The order appealed from must be affirmed, with costs. It was suggested upon the argument that an injunction had been granted, by which the officers of the corporation were deprived of the control of the whole property. Such an injunction should not be issued *ex parte*, on the certificate of a vice-chancellor, or injunction master, out of court. But upon the appointment of a receiver of all the property and effects of a corporation, for the purpose of closing up its affairs, it is proper that the court should make it a part of the order, that the directors and officers of the corporation be restrained from collecting any debts or demands due to the company, and from paying out, assigning, or delivering any of the property, moneys, or effects of the corporation to any other person, and from incumbering the same. The affirmance of the order, therefore, is to be without prejudice to the right of either party to apply, to the vice-chancellor, to have the receivership extended to all the property and effects of the corporation; and to have an injunction granted in the proper form, if it has not already been regularly issued.

Order accordingly.

CREDITORS OF INSOLVENT CORPORATION; REMEDIES OF, under the New York revised statutes: See *Judson v. Rossie Galena Co.*, 38 Am. Dec. 569, and note. The word "petition" in the section referred to in the principal case, relating to insolvent corporations, includes also a bill in equity, for every bill is a petition for relief: *Van Pelt v. United States etc. Co.*, 13 Abb. Pr. (N. S.) 331; S. C., 35 N. Y. Super. Ct. (3 Jones & S.) 117, citing *Morgan v. New York etc. R. R. Co.* The case is cited also in *Sherwood v. Buffalo etc. R. R. Co.*, 12 How. Pr. 137, to the point that the provisions of the revised statutes of New York relating to creditors' bills do not apply to insolvent corporations. So held also as to the sections of the code relating to proceedings supplemental to execution: *Hammond v. Hudson River etc. Machine etc. Co.*, 11 Id. 33. In *Masters v. Rossie Lead Mining Co.*, 2 Sandf. Ch. 303, the principal case is however referred to as holding, not that a creditor's bill can not be filed against an insolvent corporation, but merely that no preference can be thereby obtained. Indeed the foregoing decision clearly is not an authority against the filing of such a bill. It merely determines that the relief granted must be the same as if the creditor had proceeded under the statute. In *Corning v. Mohawk Valley Ins. Co.*, 11 How. Pr. 191, it is decided that the creditor may proceed by action under the code. That a judgment creditor of an insolvent corporation obtains no preference by filing a creditor's bill, but that the distribution of the corporate effects must be in accordance with the statute, is held, citing the principal case, in *Buchanan v. Smith*, 7 Nat. Bank Reg. 526. See also 16 Wall. 309. The rule for the distribution of the corporate effects laid down by the chancellor *supra*, is approved in *Hammond v. Hudson etc. Machine Co.*, 20 Barb. 382. The final order appointing a receiver of the property of such a corporation is in the nature of a decree in a creditor's suit where several distinct creditors have claims for ratable payment or payment in order of priority: *Van Buren v. Chenango etc. Ins. Co.*, 12 Id. 675. The sequestration of the corporate effects in a creditor's suit can not be limited to the amount of the plaintiff's debt, but sweeps all the property of the corporation into the hands of the receiver: *Mann v. Penta*, 2 Sandf. Ch. 270. As to the proper mode of obtaining an appointment of a receiver, the principal case is cited in *Clinch v. South Side R. R. Co.*, 1 Hun, 639; S. C., 4 Thomp. & C. 226.

LIABILITY OF STOCKHOLDERS OF CORPORATION FOR ITS DEBTS: See *Bond v. Appleton*, 5 Am. Dec. 111; *Slee v. Bloom*, 10 Id. 273; *Adams v. Wiscasset Bank*, Id. 88; *Briggs v. Penniman*, 18 Id. 454, and note; *Judson v. Rossie Galena Co.*, 38 Id. 569, and note. That stockholders in an insolvent corporation, who have not paid the full amount of their stock, are liable ratably to the extent of the amount remaining unpaid, for the debts of the corporation, under the New York statutes, is held in *Gillet v. Moody*, 5 Barb. 189, and *Mills v. Stewart*, 41 N. Y. 389, citing the principal case. So, under a similar statute in New Jersey, *Griffith v. Mangam*, 42 N. Y. Super. Ct. (10 Jones & S.) 374; S. C., in the court of appeals, 73 N. Y. 612. But this is not an individual liability of any of the stockholders to any particular creditor; nor is it a liability to the corporation. A creditor of the corporation can not recover against a single stockholder, but must, by a complaint in the nature of a suit in equity, bring in all the delinquent stockholders: Id. That is to say, after establishing his demand at law, he must file a complaint in the nature of a creditor's bill against the corporation and its officers, and compel a discovery of the names of the delinquent stockholders, and of the amount due from each, and may, by amending his bill, make them parties, or, after exhausting the corporate property, proceed against the stockholders by a supplemental bill: *Bogardus v. Rosendale Mfg. Co.*, 4 Sandf. 92; S. C., in the court of appeals, 7 N. Y. 151.

HOLMES v. WILLIAMS.

[10 PACE'S CHANCERY, 326.]

SALE OF NEGOTIABLE PAPER AT DISCOUNT IS NOT USURIOUS, as between the vendor and vendee, where the former is the holder and apparent owner, and represents that the paper belongs to him, and is business paper, although such representation is false, and the paper was in fact made for the sole purpose of sale at a usurious discount, if the vendee purchases *bona fide*, with no knowledge of such purpose.

APPEAL from a decree of the vice-chancellor, whose opinion states the facts.

GRIDLEY, V. C. The two first-named complainants constituted a mercantile firm in Utica, and were indebted to the defendant in a large sum of money. In the month of December last, S. Holmes, one of the said firm, had in his hands a draft for two thousand five hundred dollars drawn upon the house of Morgan, Butler & Co. of New York, by Ford & Smith, D. Vanderbilt, and F. C. Chapman, and indorsed in blank by L. Harvey, which draft at the time had never been accepted or negotiated, but was accommodation paper, belonging to the drawers, made and indorsed to raise money on, for their benefit, and placed in the hands of Holmes for that purpose alone. This draft Holmes negotiated, sold, and transferred by indorsement to the defendant, at a sum considerably below the amount due by its terms, and applying a portion of the consideration upon an existing demand of the defendant, and receiving the remainder in cash—Holmes representing to Williams at the time that the draft was business paper, and was the property of himself or himself and partners. In January following, the drawers applied to Holmes for the redelivery of the draft; whereupon he applied to the defendant to take up the draft, which was effected under the following agreement: That the two Holmes, with Kellogg as surety, should give the defendant their note, due on May 4, 1839, for the amount due on the draft, and that a suit should be commenced against the Holmes, upon which they should give a *cognovit* upon which judgment should be entered and execution issued and levied on the property of the two Holmes, returnable at the next term thereafter. The bill prays that the defendant may be perpetually enjoined from prosecuting the judgment execution, and that the same may be decreed to be satisfied of record, by the said defendant; and that he also may be decreed to deliver up the note to be canceled.

The first question material to be decided is whether the pur-

chase of the draft was usurious so that it was a void security in the defendant's hands. Were this a new question of construction to be settled under the statute, I confess I should think it was not. There is a good legal reason why a security actually tainted with an original act of usury, should be held void in the hand of a *bona fide* and innocent holder. For the statute has declared it so in terms and in all such cases as of notes given in violation of the statute against gaming, horse-racing, etc. Courts have uniformly held the securities void not merely against the payees and holders, with notice, but against holders receiving them for value and before maturity and without notice. But to hold a security purchased as this draft was, tainted with usury and void in the hands of the purchaser, the purchase must be decreed, *pro hac vice*, a loan—a mere contract of borrowing and lending. It is true that a contract of purchase in words is very properly held to be in construction of law a contract of loan—when such a device is resorted to to cover a transaction which is really a loan. But how is such a transaction to be regarded as a loan upon principle when the purchase is *bona fide*? Suppose the contract to be written out, describing A. the owner of a bond made by B., and setting out the sale of it for a sum less than the amount due on its face, and providing that a portion should be applied on a demand due from the seller to the purchaser and the residue paid in money—and suppose further that on the part of the purchaser it is a *bona fide* purchase, and not intended by him as a cover for a loan, there being nothing in the law making such a purchase (if real) unlawful: it would seem to be doing violence to the contract as it is set forth in words, and also as understood in the minds of the parties, especially of the purchaser, to hold it a loan and not a purchase. Was there ever an agreement to loan money in the case supposed either in fact or intent? Did two minds ever meet and assent in fact or intent upon any such contract, and does not the law by its potent power of construction, when it declares such a purchase usurious, annihilate the actual agreement of the parties and substitute another in its stead totally different from it, thus changing an act in itself lawful into one which is declared to be a violation of a penal statute? When one intentionally takes eight instead of seven per cent., though he may not intend to be guilty of usury, he is nevertheless guilty, for he intends to do what he does, but mistakes the law. Here, however, he buys a security which turns out to be accommodation paper; but he never agreed to buy any such paper; he con-

tracted to buy it as being business paper. He was mistaken in the fact, not in the law. Nevertheless it is the settled doctrine of the courts that such a transaction is usurious: See *Bush v. Livingston*, 2 Cai. Cas. 66 [2 Am. Dec. 316]; *Cortelyou v. Lansing*, Id. 206, 2d ed.; *Munn v. Pres. etc. of Commission Co.*, 15 Johns. 44 [8 Am. Dec. 219]; *Bennet v. Smith*, Id. 355; *Cram v. Hendricks*, 7 Wend. 569. The consequence of this doctrine as applied to this case is, that the draft was, in the hands of the defendant, so far as respects his right to maintain an action on it, tainted with usury and void.

The next question is, whether the note made by the complainants to secure the amount due upon the draft when such draft was taken up, is also usurious and void. The complainant's counsel insists that it is a new security, substituted in the place of an usurious one, and therefore is itself tainted with usury. And such is undeniably the true doctrine as applied to ordinary cases of new securities substituted in the place of usurious ones, and is illustrated by the case of renewals of a usurious note; and I apprehend that a change of a part, or even all of the names upon the paper, would not alter the legal rule. The defendant's counsel admits the existence of this rule, but maintains that it is not applicable to a case where the holder of the tainted security is innocent of the usury in fact; and that the defendant in this case, though his purchase of the draft was technically usurious, is entitled under this rule to stand in the place of an innocent holder.

What then is the rule as to securities given in the place of usurious ones, to secure the amount to an innocent holder of the latter? In *Cuthbert et al. v. Haley*, 8 T. R. 390, the plaintiff brought debt on a bond for two thousand six hundred and eighty dollars, conditioned to pay one thousand three hundred and forty dollars with interest, and the defendant pleaded that the bond was given for securing money lent by one Plank to the defendant upon a usurious contract between Plank and the defendant, etc. On the trial, it appeared that Plank discounted eighteen promissory notes of the defendants amounting to one thousand three hundred and forty-four pounds, two shillings, and three pence, and took usurious interest on them. Plank afterwards carried them to the plaintiffs, his bankers, who gave him credit for them. When the notes fell due the plaintiffs applied for payment, and the defendant paid him forty-four pounds, two shillings, and three pence in money, and gave the bond in question for the residue. Lord Kenyon was of

opinion that the plaintiff should recover, and so ruled, allowing a rule to show cause. On the argument of the cause at bar the defendant's counsel strenuously urged that the bond in question was but a substituted security, and cited various cases in which such securities had been held usurious. The judges, however, were unanimously of opinion that this rule, though they fully admitted its existence, and its application in ordinary cases, did not apply to a case where the substituted security was given to an innocent holder. So, too, in *Powell v. Waters*, 8 Cow. 690-692, Chancellor Jones (after having said that Parish, who discounted the first note, knew it was not business paper, and that his knowledge affected his partners) declares that the note then before the court was a substituted security for the first, and therefore void; and adds that such substituted security, given to an innocent holder, would be valid. He says that a new security taken by such a meritorious holder of the usurious note, has a just claim to protection. The rule then is clearly established, that an innocent holder of paper substituted for usurious paper will be protected, and that the ordinary principle, which declares that a new security is infected with the same usury which tainted that for which it is substituted, is inapplicable to an innocent holder of usurious paper.

Is the defendant to be regarded as an innocent holder of the draft in question in this suit? It is true, that by a series of decisions, which I have already cited, the act of purchasing the draft (though he erroneously supposed it to be business paper, and therefore a lawful article of sale and purchase) was technically legally usurious. But was he guilty in intent and in fact? Could he have been punished upon an indictment under the act of 1837? On the contrary, was he not the innocent purchaser of this paper, and the victim of the civil disabilities incurred under the act by the most flagrant false pretenses of one of the individuals who now asks a court of equity to visit upon him the consequences which flow from such fraudulent misrepresentations? Though this draft be held void in the defendant's hands, yet, could he not sustain an action against S. Holmes for the loss he suffered by reason of his false affirmation that the draft in question was his own property, and therefore a lawful subject of purchase, when it was not; by reason of which the very act of purchasing rendered the purchase void? Could he not also recover in an action for money had and received, the money he advanced upon this purchase; which was valueless, solely by reason of the fraudulent concealment and misrepresentation of

a fact in relation to the draft? Can a man by the grossest fraud, amounting, as I think, to the offense of obtaining money by false pretenses, get another's money (without any intentional fault on the part of that other), and not be responsible for it at law? I think not. I think S. Holmes was liable to the defendant for the money he obtained from him by the fraudulent transfer of paper which he falsely declared to be his own, and which, if it had been so, would have been a valid and available security in the defendant's hands. If then this money was really due and recoverable from Holmes, would not a note given by S. Holmes alone, to secure it, be good and available against him? Suppose that the defendant had, while he held the draft, learned that it was not the property of Holmes, and that by Holmes' false representation he had parted with his money under circumstances which rendered the draft void in his hands, and had called on Holmes and charged him with the fraud, and Holmes had then taken up the draft and given his own note instead of it; could Holmes defend himself against a suit on such note on the ground of usury? Would it not be allowing him to succeed in a defense founded on his own fraud instead of the fraud of his antagonist? Suppose he had transferred a forged note, or a note infected with existing usury, or void for any other cause, affirming it to be good and denying the facts which rendered it void, would he not be liable? And if he had got back the void paper and given his own note in its stead, could he defend himself in a suit upon such note? I think the merits of his defense would be the same in all the cases I have supposed. If the new security then would have been free from objection for usury, if executed by S. Holmes alone, it must be so notwithstanding others signed the note as sureties.

In *Cram v. Hendricks*, 7 Wend. 584, the chancellor, in commenting on the case of *Munn v. Pres. etc. of Commission Co.*, 15 Johns. 57 [8 Am. Dec. 219], says in express terms, that the broker who sold the bill to the purchaser was liable to him for the money advanced, though the note might be void in the hands of such purchaser, he, like the defendant in this case, supposing that the agent owned the bill. This opinion of the chancellor, though not necessary to the decision of that case, is entitled to great weight as the opinion of a learned jurist; and the weight of that authority, I think, is somewhat strengthened by the fact that the chancellor was for holding the doctrine impeaching securities for usury with greater strictness and rigor than a majority of the court in the case then before them. I

am not prepared to say that Holmes would have been responsible for more than the money he advanced, especially in an action for money had and received or money paid; though he probably might be for the full amount of the draft in an action on the case. But however that may be, I do not think that embracing in the new note the whole amount of the draft would render that note usurious, provided it would not otherwise be so. If the false affirmation had been true, the draft would have been available to the defendant for the whole amount of it, and if Mr. Holmes had chosen to indemnify him by giving him a note for that amount, I do not see that it would be usurious; or even that he could in a suit upon this note have set up a defense as to the excess. To sustain this bill, however, the note must be adjudged void for usury, which, for the reasons before stated, I am of opinion can not be maintained. To sustain it would be to make the court the organ of great injustice; I do not mean merely by enforcing the statute against usury even in its utmost rigor, severe as that statute is—for he who will knowingly violate the statute must not complain if he is compelled to suffer the extreme penalties of the act—but it would present Mr. Holmes in the attitude of fraudulently obtaining the defendant's money for worthless paper, and after receiving back the paper and giving his own note as an equivalent, then asking the court of chancery to make his fraud successful, and to protect him in the possession of its fruits, by declaring the note thus given void for usury. I can not but think that to carry the principle to such an extent would be, in the language of Lord Kenyon in the case before cited from Durnford & East, extending it further than policy or the words of the act require. I have already remarked, that in my judgment the securities must stand or fall with this principle, that if this note would be good if made by Sylvanus Holmes alone, it must be adjudged good though others unite with him in securing a demand due from and legally collectible of him.

The conclusion to which this view of the subject brings me, without examining the other questions raised and discussed by the counsel, is, that the bill should be dismissed, with costs.

The complainant appealed.

S. Stevens, for the appellant.

S. Beardsley, for the respondent.

The CHANCELLOR said that he concurred in the opinion of the vice-chancellor, that where the holder and apparent owner of

negotiable securities sells them at a discount, to a *bona fide* purchaser, who has no knowledge of the purpose for which such securities were made, the holder representing such securities to belong to himself, and to be business paper, the transaction was not usurious, as between the vendor and the vendee; although the representation of the vendor was false, and the securities were in fact made for the sole purpose of being sold at an usurious discount in the market.

Decree affirmed, with costs.

SALE OF NEGOTIABLE PAPER DEEMED USURIOUS, WHEN, AND WHEN NOT: See *Munn v. Commission Co.*, 8 Am. Dec. 219, and note; *Greenhow v. Harris*, Id. 751; *Dunham v. Gould*, Id. 323; *Lloyd v. Keach*, 7 Id. 256; *Bank of Elisabeth v. Ayers*, 11 Id. 535; *Ruffin v. Armstrong*, Id. 774, and note; *Flemming v. Mulligan*, 13 Id. 707, and note. The citations of the principal cases refer generally to the doctrines laid down *arguendo* in the opinion of the vice-chancellor. The case is very frequently referred to as authority for the principle, that one who sells a note at a discount to a *bona fide* purchaser, representing it to be business paper, and that he is the owner, will be estopped from setting up the defense of usury against such purchaser, although, as in the principal case, the note was made solely for the purpose of raising money at a usurious rate of interest: *Chamberlain v. Townsend*, 7 Abb. Pr. 31; S. C., 36 Barb. 611; *Hungerford's Bank v. Potsdam etc. R. R. Co.*, 10 Abb. Pr. 26; S. C., 19 How. Pr. 43; *Griggs v. Howe*, 2 Abb. App. Dec. 296; S. C., 2 Keyes, 580; S. C., 3 Id. 171; *Buffit v. Troy etc. R. R. Co.*, 36 Barb. 428; *Ferguson v. Hamilton*, 35 Id. 436. The mere fact that the owner of a note is willing to sell it at a discount beyond the legal rate of interest, does not throw the responsibility of further inquiry upon the purchaser: *Mechanics' Bank v. Foster*, 19 Abb. Pr. 49; S. C., 44 Barb. 90; 29 How. Pr. 410. In *Trescott v. Davis*, 4 Barb. 495, it is laid down by Sill, J., that to make false representations by a payee of a note to a purchaser of it that it is business paper as estoppel, they must be made for the purpose of inducing him to purchase. His honor says, also, that the doctrine laid down by the chancellor in the principal case is contrary to that of the vice-chancellor, in holding that the transaction was not usurious, and that the true ground of decision was, not that there was no usury in the sale, but that the party was estopped from setting it up.

Where the maker of a note represents to a *bona fide* purchaser of it, that it was given for value and will be paid when due, he is estopped from defending against it on the ground of usury: *Mechanics' Bank v. Townsend*, 29 Barb. 575; S. C., 17 How. Pr. 570; *Brookman v. Metcalf*, 34 Id. 433; S. C., 4 Rob. 574. So, generally, any party to a note or bill may be estopped by his own acts and declarations from setting up the defense of usury: *Hungerford's Bank v. Dodge*, 30 Barb. 628; *Strong v. New York etc. Mfg. Co.*, 37 N. Y. Super. Ct. (5 Jones & S.) 285. An estoppel *in pais* may be urged against the defense of usury as well as against any other: *Mason v. Anthony*, 3 Abb. App. Dec. 208; S. C., 35 How. Pr. 478; 3 Keyes, 610. But although the payee and seller of a note may be estopped by his representations from defending against it on the ground of usury, the maker of it is not estopped if he has made no such representations: *Dowe v. Schutt*, 2 Denio, 624. The statute of usury makes no exception in favor of innocent or *bona fide* purchasers; and

if a note is usurious in its inception, the maker may defend against it on that ground although the purchaser was ignorant of its character: *Hyland v. Stafford*, 10 Barb. 560; *Hall v. Earnest*, 36 Id. 589. A note made for the purpose of raising money and first passed as a valid contract to one who takes it at a discount beyond the legal interest, is void for usury though the person taking it supposes it to be business paper belonging to the person who sells it to him, and intends in good faith to purchase the note and not to loan money, and he can not enforce it against the maker: *Ayer v. Tilden*, 15 Gray, 182. But where negotiable paper, usurious in its inception, is transferred to a *bona fide* holder who subsequently takes a new note from the debtor for the amount, the new note is not tainted with the original usury, and is valid: *Sherwood v. Archer*, 10 Hun, 74; *Myers v. People*, 14 Id. 416. A bill payable to the drawer's order and accepted for his accommodation, has no legal inception until indorsed to a third person for value; and if the indorsee deducts more than legal interest, it is usurious: *Clark v. Sisson*, 4 Duer, 415. In all these cases, *Holmes v. Williams* is cited as an authority for the doctrines laid down.

WHAT TRANSACTIONS ARE USURIOUS, GENERALLY: See *Raynolds v. Carter*, 37 Am. Dec. 642, and the note thereto collecting the cases in the American Decisions on that point.

AM. DEC. VOL. XL—17

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

PEOPLE v. WILLIAMS.

[4 HILL, 9.]

ONE CAN NOT BE INDICTED FOR MAKING REPRESENTATIONS which, though false, could not have misled the person to whom they were made, had he exercised common prudence and caution.

CERTIORARI to the Erie general sessions, at which the defendant was convicted for obtaining, by false pretenses, the signature of one Van Guilder, to a deed of lands. At the trial, the defendant's counsel requested the court to charge that the pretenses laid in the indictment were not such as could be made the subject of a criminal prosecution, but the court refused, and held the contrary. The other facts appear from the opinion.

E. Cook and D. Tillinghast, for the defendant.

H. W. Rogers, district attorney, *contra*.

By COURT. It is impossible to sustain this indictment without extending the statute to every false pretense, however absurd or irrational on the face of it. The charge is, of falsely representing to Van Guilder that he was about being proceeded against for a debt due from him, and that, by means of the representation, his signature was obtained to a deed of lands. How such a result was made to follow from means apparently so inadequate, we are left to conjecture. Looking to the case made by the indictment, Van Guilder's only ground of complaint would seem to be, that in attempting to defraud another, he had himself been defrauded. But whatever the fact is in this particular, there can be no doubt that an exercise of common prudence and caution on his part would have enabled him

to avoid being imposed upon by the pretenses alleged; and if so, the case is not within the statute: See *Goodhall's Case*, Russ. & Ry. Crown Cas. 461; Rosc. Crim. Ev. 362.

New trial ordered.

FALSE REPRESENTATIONS, UNLESS CALCULATED TO MISLEAD persons of ordinary prudence and caution, are not indictable, although they were made with intent to cheat and defraud: *People v. Stetson*, 4 Barb. 156; *Dord v. People*, 9 Id. 674; *Scott v. People*, 62 Id. 75; *People v. Crissie*, 4 Denio, 523; *Long v. Warren*, 68 N. Y. 432; all citing the principal case.

THE PRINCIPAL CASE IS CITED in *People v. Town Auditors of Castleton*, 44 How. Pr. 245; S. C., 13 Abb. Pr. (N. S.) 438; in *People v. Brady*, 56 N. Y. 589; and in *People v. Wilber*, 4 Park. 24, to the point that an indictment should state the facts which go to make up the offense charged. It is also cited in *Brown v. People*, 16 Hun, 537, to the point that in order to convict under the statute for punishing false pretenses, the jury must find that the false representations were uttered with the intent to cheat and defraud. And it is distinguished in *People v. Sully*, 5 Park. 167.

INTENT TO CHEAT AND DEFRAUD is the gist of the action in a prosecution for obtaining goods by false pretenses: Note to *People v. Kendall*, 37 Am. Dec. 243.

FALSE PRETENSES GENERALLY: See *Tyler v. State*, 36 Am. Dec. 298, note 300; *People v. Clough*, 31 Id. 303, note 306; *People v. Haynes*, 23 Id. 530, note 550; *People v. Genung*, 25 Id. 594, note 596.

SHARP v. JOHNSON.

[4 HILL, 92.]

WHERE LANDS ARE TO BE TAKEN UNDER STATUTE AUTHORITY, in derogation of the common law, every requisite of the statute having the semblance of benefit to the owner must be strictly complied with.

ONE CLAIMING TITLE TO LANDS UNDER SALE BY MUNICIPAL CORPORATION, for unpaid assessment for opening a street, must show that all the requirements of its charter were strictly complied with, or his title will fail. And where such charter requires that an application to have a street laid out, shall come from a majority of the owners of the property liable to be assessed, if the purchaser fails to prove that such application was signed by a majority of such owners, the title of the former owner must prevail.

WHERE STATUTE REQUIRES NOTICE TO BE GIVEN TO OWNERS OF LANDS about to be taken for opening a street, in order that reasonable compensation may be made for such lands, such notice must be given to the owners, before appraisers can be appointed to determine the value of said lands.

WHERE LANDS IN A CITY OR TOWN ARE DIVIDED INTO LOTS, they must be valued by lots, and not by blocks, in making assessments upon them for opening streets.

ASSESSMENT ON LAND FOR STREET IMPROVEMENT MUST DESCRIBE THE LOTS ASSESSED, so that they can be identified, or a sale under such as-

assessment will be void, and merely stating the number of feet front is not a sufficient description.

WHERE COLLECTOR IS REQUIRED TO MAKE AFFIDAVIT that the owner of a lot assessed can not be found, or that he has not sufficient personal estate in the city or town to pay the assessment, before such lot can be sold for the assessment, the want of such an affidavit will be fatal to a sale.

EJECTMENT, tried at the Kings circuit, for an undivided one seventh of a lot of land in Williamsburgh. The plaintiff showed title as one of the seven children and heirs at law of John Sharp, who died seised in 1825. The defense rested on a sale of the land for an assessment for the expenses of opening a street. The jury, by direction of the court, found for the plaintiff. The other facts sufficiently appear from the opinion.

J. Greenwood, for the defendant.

E. Sandford, for the plaintiff.

By Court, BRONSON, J. For some of the principles which must guide our determination, it will be sufficient to refer to the case of *Sharp v. Speir*, 4 Hill, 76, which has just been decided. Although the corporation has not been very explicit in telling us how much they intended to do, it sufficiently appears from the case that North Third street had been previously laid out upon the village map, and that at this time the corporation attempted to accomplish two things—first, to acquire the necessary lands for the purpose of opening the street, and then to assess the price of the land taken and the other necessary expenses of opening, pitching, and regulating the street, upon other lands. A portion of the land belonging to the children and heirs of John Sharp, of whom the plaintiff is one, was taken for the street, and the residue was assessed and sold for the benefit which they were supposed to derive from the improvement. The children have thus lost all—at least for a long term of years; but if the proceedings were authorized by law, and have been properly conducted, they must bear the misfortune. On the other hand, it was the business of the purchaser, and those claiming under him, to examine the power and regularity of the proceedings; and if their title is found defective, they will have no just ground for complaint, unless it be against the corporation.

The first question will be upon the proceedings for taking that portion of the plaintiff's land which is occupied by the street. The village of Williamsburgh was incorporated in April, 1827: Stat. of 1827, p. 270. The twenty-fourth section of the act provides, that "the trustees of said village shall or may, on

an application in writing of a majority of the persons owning the property described in any such application, and who are intended to be benefited thereby, or whose property shall be assessed for the payment of the expense attending the same, and upon such application, they are hereby fully authorized and empowered to widen and alter all public roads, streets, and highways already laid out in said village," etc.; "and also to lay out and make such other roads and streets, conformable to the map of said village, as they shall think necessary or convenient for the inhabitants." The section then goes on to provide for acquiring the necessary lands "through which such new roads or streets are to run." The section is rather a clumsy performance in the way of legislation; but from this and other provisions in the act, taken in connection with the facts disclosed by the case, I infer that a map had been made of the village prior to 1827, on which the streets had been laid down, some of which were then open, while others only appeared upon paper. This section was intended to provide for altering the streets already made, and for opening others "conformable to the map." North Third street had been laid out on the map, and it was now proposed to open it. That could only be done on such an application in writing as has already been mentioned. Let us see what authority the trustees had to proceed. They had a paper signed by fourteen persons, in which they "suggest the propriety of having the street opened." If this can be called "an application" to have the street opened, there are other difficulties which are insuperable. Although the petitioners say that they are "inhabitants in and about North Third street," they do not "suggest" that they own a single foot of land in the street, or elsewhere; nor is any land "described" in the application, as the statute requires. There are only fourteen petitioners, while there are forty-four different assessments. And although some names appear more than once in the assessment, nearly one thousand three hundred feet of front on the street is set down as belonging to "unknown owners." How many there may have been of this unfortunate class of citizens, it is impossible to say. The burden lay on the defendant of showing that the application came from "a majority of the persons owning the property," and he has not only failed to show it, but the evidence is nearly or quite conclusive that a majority did not apply. The trustees, therefore, had no authority whatever to open the street, and the plaintiff's land in the site of the street has not been taken according to law. She owns it still.

There is a further difficulty about the taking of land for the street. The twenty-fourth section provides that when the trustees shall require any land for that purpose, "they shall give notice thereof to the owners or proprietors of such lands, or his or their agent or legal representative, to the end that reasonable satisfaction may be made for all such lands as shall be taken and employed for the use or uses aforesaid, and the said trustees may and are required to treat and endeavor to agree with the owners and persons interested therein, or his or her or their agent or legal representative, and if in case any such owners or proprietors shall refuse to treat for a reasonable compensation, in manner aforesaid, then and in such case the true value of the land and damages shall be set and appraised by two justices of the peace of the county of Kings, by the oath of twelve freeholders;" and the payment or tender of the money "shall be a full authority to the said trustees to cause the said lands to be converted for the purposes aforesaid." There is no pretense that the trustees gave notice to the plaintiff, or to any of the other heirs of John Sharp, or to any agent or representative of theirs, that the land was required; nor that the trustees made any attempt to treat or agree with the owners, or any of them; and until that had been done, there was no authority for calling a jury: *Rex v. Croke*, Cowp. 26; *Rex v. Manning*, 1 Burr. 377; *Rex v. Mayor of Liverpool*, 4 Id. 2244.

But it is said that the plaintiff and the other heirs of John Sharp were "unknown owners," and therefore the trustees could neither give notice, nor treat with them. I answer, it was the business of the trustees to find out the owners, and there is no reason to suppose that it could not have been done, and that too with very little trouble. John Sharp died in the city of New York only two years before these proceedings were instituted, and he was in possession of the property at the time of his death. If it had been thought a matter of the slightest importance to follow the statute, and regard the rights of owners, these heirs would have been found, instead of resolving that "notice be put upon the lands of all unknown owners." Whether a white wand was actually put up upon the lands to let the owners know that they were in danger, does not appear, nor is it a matter of any importance. When the statute says, you shall give notice to and treat with the owner, it can not be satisfied by sticking up a notice on the land. That is not a sufficient ambassador. Let it be granted that these "unknown owners" could not have been found even if a diligent inquiry

had been instituted, and what then? It does not follow that their land might be taken. The difficulty of complying with a statute does not repeal it. The trustees were acting under a naked power. If the power was too strait for practical utility, they should have asked a new grant; or if they did not choose to do that, they should have answered the petitioners: "We have no authority to take any man's land for a street until after we have given him notice, and endeavored to treat with him."

Whether an application to these heirs would have been likely to result in a treaty or not, can be a matter of no importance. It would at least have served the purpose of giving them notice, and then their land might have been saved. When lands are to be taken under a statute authority, in derogation of the common law, every requisite of the statute having the semblance of benefit to the owner must be strictly complied with: *Atkins v. Kinnan*, 20 Wend. 241 [32 Am. Dec. 534]. Although this doctrine may have been often disregarded by city and village corporations, we think it both good law and good morals. The legislature has not been too careful in protecting the rights of the land-owner. On the contrary, a wide door has been opened for taking private property without the consent of the owner, whenever his neighbors happened to think that the public interest required him to sell. None of the barriers which remain ought to be thrown down. Williamsburgh is a road district, and the trustees have all the powers within the village which formerly belonged to the commissioners of highways of the town of Bushwick: Sess. L. of 1827, p. 275, sec. 17. But that does not bring the case within the decision in *Graves v. Otis*, 2 Hill, 466, for the street was not laid out, nor the damages ascertained in the manner prescribed by the act relating to the highways on Long Island: Id. 1830, p. 51, sec. 47-53. The trustees evidently proceeded, or rather professed to proceed, under the twenty-fourth section of the charter.

There is still another difficulty with this attempt to take land for the street. The justices and jury valued the land and damages by blocks, one of four hundred and twenty feet front, the second four hundred and sixty feet, the third five hundred and ten feet, the fourth four hundred and sixty feet, and the fifth without saying how many feet front "running measure" there was in it. The first block was valued at three dollars per foot, the second at two dollars and seventy-five cents, the third at two dollars and fifty cents, and the fourth and fifth at two dollars per foot front. Now as the land decreased in value from the

starting point to the other end of the street, it is morally certain that all of the lots in the same block were not of equal value, and consequently the owner of one lot either got too much, or the owner of another lot got too little. We do not understand the case of *Coles v. The Trustees of Williamsburgh*, 10 Wend. 659, as sanctioning this valuation. The justices and the jury should have proceeded by lots instead of blocks.

We come now to the assessments which were made to pay the expenses of opening, pitching, and regulating the street, under which the lot in question was sold. The trustees of the village have authority to direct "the pitching, regulating, and paving the streets thereof," and also "the altering, amending, and cleansing of any street:" Sess. L. of 1827, p. 276, sec. 21. But "no street" "shall be pitched, paved, altered, or amended, unless the same shall be requested in writing by a majority of the persons owning the property intended to be benefited thereby, or whose property shall be assessed for the payment of the expenses attending the same:" Sec. 22. And the twenty-fourth section, which gives authority "to lay out and make" streets, contains, as we have already seen, a like restriction upon the power of the trustees. The petition, such as it was, on which the trustees acted, has already been noticed on another branch of the case. There is no evidence that a majority of the land-owners requested this improvement, and it is enough that the fact was not proved. But there is, in addition, very satisfactory evidence that the fact did not exist. The trustees acted without authority, and their proceedings were consequently void.

Although this is enough to dispose of the case, some of the other questions discussed at the bar ought, perhaps, to be briefly noticed. As to the lands taken for the street, the expenses were to be "assessed among and upon the owners and occupants of the several houses and lots intended to be benefited:" Sec. 25. And the other expenses were to be assessed "among the owners or occupants of all the houses and lots to be benefited thereby." The two provisions are substantially alike, though there is a slight difference in words. The property on the street had been surveyed and divided into lots of twenty-five feet front long before, and the lots were undoubtedly owned by different individuals. It appears, at least, that the plaintiff owned one such lot in a block of four hundred and twenty-nine feet front on the street. Now what was done? The assessors were not furnished with a map, or any information concerning who was to be assessed; but they were sent out with a tape-line to discover, as

well as they could, both lands and owners. They measured and assessed by blocks, instead of lots, though as to some of the blocks they put down the names of several individuals as the owners of separate parcels. But when they came to the plaintiff's land, her lot of twenty-five feet front was lumped with other lands, amounting in all to four hundred and twenty-nine feet front, and the whole set down to "unknown owners." The clerk of the corporation testifies that the assessment was not made in the usual mode, which was to assess by lots, instead of blocks, which were specified in the assessment. But independently of this departure from the usage, it is impossible to maintain such an assessment as was made here. Where the lands in a city or village have been surveyed and laid out into lots, the owners should be assessed by lots, and each owner should be assessed by himself, and in respect of his particular land: *The King v. The Trustees of Norwich*, 5 Ad. & El. 563. It may well be that every lot in the same block is not of equal value. And besides, the assessment must be so made that each owner may know what is his particular burden, and be able to discharge it without calling in the aid of others. If this four hundred and twenty-nine feet front was properly assessed in one body, the corporation was not obliged to receive less than the whole charge imposed upon it, and thus the plaintiff might have been compelled to pay the assessments upon other persons, or lose her own land. The statute does not authorize an assessment upon owners generally, but says it shall be made "among" the owners; and to make the matter still more clear, it provides that the assessment shall be among the owners of "the several houses and lots." The assessors might just as well have put down all the land on the street in one lump, as to do what they have done. There was an utter failure to comply with the requirement of the statute in this particular. The power has not been pursued, and the sale consequently conferred no title on the purchaser.

The assessment was vicious in another respect. The only authority to sell is, where there is a tax "on lands or tenements:" Sess. L. of 1827, p. 279, sec. 26. If the word "tax" includes a street assessment, it must still be an assessment "on lands or tenements." Here we have nothing but one line of the boundary of any land. The assessors have assessed certain sums on a given number of feet front, without saying whether the land extends back one foot or one hundred—whether it goes quite through to the next street, or only part of the way. If they had

referred to the map, and mentioned lots as there laid down, that would have answered. But neither map or lots are mentioned. I do not mean to censure the assessors. They did, perhaps, the best they could with a tape-line, and they had no other guide. When the assessment is completed, the trustees are required to give fourteen days notice that the same will be ratified and confirmed within one month, unless satisfactory objections are made: Secs. 21, 25. It does not appear that any notice was given. And here I will repeat, that the burden of showing that the power has been duly executed lies on the purchaser, and without proving it, his title is good for nothing.

The trustees are not authorized to sell any land until the collector has made affidavit that the owner can not be found, or, if found, that he has not sufficient personal estate in the village to pay the tax: Sec. 26. No such affidavit was produced, nor was its absence accounted for, if it ever existed. If everything else had been regular, the want of an affidavit would be fatal to the sale.

I am weary with pointing out defects in these proceedings, and will go no further. I ought, however, to say, that by assuming, as has been done, that this corporation might, under any circumstances, sell lands for the payment of an assessment, it must not be inferred that we are of opinion that the power exists. There is no power to sell lands, except for a tax: sec. 26; and although these street assessments are made a lien on the land, secs. 21, 25, it does not follow that the corporation can sell the land without first going into chancery, and obtaining the aid of that court to enforce the lien. My impression is, that the lien can not be enforced at law; but upon that point we give no opinion either one way or the other.

New trial denied.

WHERE LANDS ARE TO BE TAKEN UNDER STATUTORY AUTHORITY, in derogation of the common law, every requisite of the statute having the semblance of benefit to the owner must be strictly complied with: *Corwin v. Merritt*, 3 Barb. 343; *Hill v. Draper*, 10 Id. 476; *Schuyler v. Marsh*, 37 Id. 355; *Bunner v. Eastman*, 50 Id. 643; *Doughty v. Hope*, 3 Denio, 599; *Sherwoode v. Reade*, 7 Hill, 434; *Hopkins v. Mason*, 42 How. Pr. 116; *Powell v. Tuttle*, 3 N. Y. 405; *Whitney v. Thomas*, 23 Id. 286; *Newell v. Wheeler*, 48 Id. 490; *Astor v. Mayor etc. of New York*, 37 Supr. Ct. 556; *James v. Howard*, 4 Mich. 448; *Curran v. Shattuck*, 24 Cal. 432, all citing the principal case.

WHERE STATUTE REQUIRES NOTICE to be given previous to the sale, it must be given or the sale will be void: *McDermott v. Board of Police*, 5 Abb. Pr. 435; S. C., 25 Barb. 644; *Astor v. Mayor etc. of New York*, 37 Sup. Ct. 557, all citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED in the following cases to these points:

That in an action for the collection of taxes, the plaintiff must show a strict compliance with the provisions of the statute under which the tax is levied: *Tonawanda v. Western T. Co.*, 16 Abb. Pr. (N. S.) 299; that to divest an owner of land of his property by a sale for taxes, every preliminary step must be shown to be in conformity with the statute: *Leggett v. Rogers*, 9 Barb. 411; *Wheeler v. Mills*, 40 Id. 647; that a street assessment is not a tax: *Creighton v. Manson*, 27 Cal. 620.

RAPELYE v. PRINCE.

[4 HILL, 119.]

WHEN ONE COVENANTS FOR RESULTS OR CONSEQUENCES OF SUIT between other parties, the judgment or decree therein is evidence against him.

WHERE ASSIGNOR OF MORTGAGE COVENANTS WITH ASSIGNEE that the property mortgaged will produce a given sum over and above the costs of foreclosing, and that, if it does not, he will pay the deficiency, the proceedings in the suit to foreclose will, in an action on the covenant, be evidence against such assignor, to show the amount of the deficiency; and he will be estopped by the decree from questioning the amount found due thereby, no fraud being suggested.

WHERE DEFENDANT WISHES TO CALL PLAINTIFF AS A WITNESS, under stat. 1837, sec. 2, he must serve him with a subpoena, as he would any other witness.

MOTION TO SUSPEND TRIAL TO ENABLE DEFENDANT TO SUBPOENA WITNESS whom he failed to serve properly, is addressed to the discretion of the judge, and his decision thereon is not one to which an exception can be properly taken. If such an exception be taken, the judge should strike it out before he affixes his seal.

SURPRISE IS NOT SUFFICIENT GROUND FOR MOTION FOR NEW TRIAL, after judgment has been perfected on the verdict.

MOTION FOR NEW TRIAL ON GROUND OF SURPRISE will be heard only at the special term. When the motion is made where there is also a case or bill of exceptions, the decision on the motion may be suspended until the calendar cause is argued.

WHERE MOTION FOR NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE is made, the ground of surprise may also be added, if it exists, and the whole will then be heard together.

COVENANT, tried at the New York circuit. The action was on a sealed agreement, which recited that the defendant, John D. Prince, assigned to the plaintiffs a certain mortgage which the plaintiffs purchased at the request of both the defendants. In this agreement the defendants covenanted that said mortgage should, "with reasonable care and diligence, produce and yield" to the plaintiffs the amount of the principal sum and interest thereon, "over and above the costs and expenses of suing upon or foreclosing the said indenture of mortgage;" and in the event of there happening to be any deficiency, the defendants agreed

to pay the amount thereof to the plaintiffs. The declaration alleged that the mortgage had been foreclosed, and that there was a deficiency which the defendants had not paid. The defendants pleaded *non est factum*, and gave notice of the defense of usury. On the trial the plaintiffs gave in evidence the proceedings in chancery to foreclose the mortgage, from which it appeared that the property mortgaged sold under the final decree for less than the amount due on the mortgage; it also appeared that the plaintiffs had paid a sum of money to redeem the mortgaged premises from a sale to satisfy a street assessment. This sum was added to the mortgage debt, and the decree directed a sale to pay the whole. The defendants then called on the plaintiffs to testify, but as they did not appear, the defendants moved that they be nonsuited for not appearing, and that an attachment should be issued against them. The judge denied the motion, and the defendants excepted. The defendants then moved for leave to subpoena the plaintiffs to appear and testify, but the judge refused, and the defendants excepted. The judge charged that the plaintiffs were entitled to a verdict for the whole deficiency, and the defendants excepted. The jury found accordingly. The other facts appear from the opinion.

S. Stevens, for the defendants.

T. Fessenden, for the plaintiffs.

By Court, BRANSON, J. The defendants insist that the proceedings in chancery for the foreclosure of the mortgage mentioned in the covenant are not evidence against them, because they were not parties to that suit; and for this they rely on the case of *Douglass v. Howland*, 24 Wend. 35. There, one Bingham agreed to account with the plaintiff, and to pay any balance which might be found due from him; and the defendant covenanted with the plaintiff that Bingham would perform the agreement. This accounting never took place, but an account was taken in chancery in a suit to which the defendant was not a party. We held the proceedings in chancery were not evidence, or at the least, not conclusive evidence against the defendant. But it was admitted in that case that if Bingham had voluntarily accounted and struck a balance, the defendant would have been bound by it, although he had taken no part in the transaction. Such an accounting would have been within the defendant's undertaking, but he had not covenanted for the results of a suit in chancery. The distinction taken and sustained by authority in that case fully justifies the ruling of the judge

on this trial. When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party. Now here the covenant plainly contemplates a foreclosure of the mortgage, and the defendants undertake to make up any deficiency there might be on such foreclosure. They covenant that the assigned security shall produce and yield the principal sum of two thousand five hundred dollars with interest, over and above all costs and expenses of suing upon or foreclosing the mortgage, and that they will pay any deficiency. A proceeding in chancery is the usual mode of foreclosing mortgages, and the defendants have, in effect, agreed that they will be bound by such foreclosure. We need not go beyond *Douglass v. Howland*, 24 Wend. 35, and the cases there cited, to prove that the judge was right in holding the defendants concluded by the proceedings in chancery, which ascertained and settled the "deficiency" or balance due the plaintiffs after applying the money realized by the sale of the mortgaged premises.

This view also answers the objection that the defendants could not be charged with the amount the plaintiffs had been obliged to pay to redeem the mortgaged premises from the sale for a street assessment. There can be no doubt that this sum was properly taken into the account in chancery; but if it were otherwise, the defendants are concluded by the decree which allowed that charge. No fraud is suggested, and we can not overhale the decree.

If a witness who had been duly subpoenaed should either neglect to attend, or leave court after the trial had commenced, it would rest in the discretion of the judge whether he would suspend the trial until the witness could be brought in on attachment or otherwise; and if the decision of the judge upon such a matter could be reviewed in any form, it clearly could not be done upon a bill of exceptions. This is enough to answer the exception which grew out of the absence of the plaintiffs when they were called as witnesses. But as the question has been made and discussed at the bar as to the proper mode of bringing in the plaintiff as a witness for the defendant under our usury statute, and as the same question may often arise, it seems proper to dispose of it. When the defendant pleads or gives notice of the defense of usury, and verifies the truth of his plea or notice by affidavit, he may "call and examine the plaintiff as a witness, in the same manner as other witnesses may be called and examined." Stat. of 1837, p. 487, sec. 2. It seems almost too

plain for discussion that the defendant must take the same steps with the plaintiff, as he would with any other person whose attendance as a witness he wished to secure, which are, to serve him with a subpoena in due season, and pay or tender his legal fees. The defendant may call the plaintiff. How call him? The statute says, as a witness. And then to make the matter quite clear, it adds, "in the same manner as other witnesses may be called." Here the defendants had done nothing beyond giving the plaintiffs notice to attend. That they were not bound to regard. When the defendants had found out their mistake, they wished the judge to suspend the trial until they could seek and serve a subpoena on the plaintiffs. That motion was clearly addressed to the discretion of the judge; and his decision upon it, whether right or wrong, does not make a point upon which an exception can properly be taken. When parties except upon such matters, the judge should strike the exception out of the bill before he affixes his seal. But whether in or out, the decision of the judge upon such a question can not be reviewed in this form.

A motion is also made for a new trial on the ground of surprise. The defendants were surprised when they discovered that they had made a mistake in not serving the plaintiffs with a subpoena. That would hardly be a sufficient ground for granting a new trial under any circumstances. But it is a full answer to this motion that judgment has been perfected on the verdict. A case or bill of exceptions may sometimes be argued after judgment: Stat. of 1832, p. 188, sec. 1; but the statute does not extend to this motion.

It must not be understood that motions of this kind will hereafter be heard at the general term. They do not belong to the calendar, but should be made at the special term. And this is so, although a case or bill of exceptions may have been made. There can not often be any very intimate connection between the questions of law which arose on the trial, and an application for a new trial on the ground of surprise. By confining such motions to the special terms, expense and delay will be avoided. When the motion is made where there is also a case or bill of exceptions, we can, if it shall be deemed expedient, suspend a decision on the motion until the calendar cause is argued. This question of practice was not noticed in *Tilden v. Gardiner*, 25 Wend. 663. The forty-seventh rule makes this a non-enumerated motion. The word "surprise" was not in the rule until 1837, and was inserted at that time for the very pur-

pose of sending such motions to the special term. Where there is a motion for a new trial on the ground of newly discovered evidence, which must always be accompanied by a case, the ground of surprise, if it exist, may also be added, and the whole will then be heard together. This will satisfy the word "exclusively" in the rule. But in all other cases, a motion on the ground of surprise belongs to the special term, and must, like other motions of the same character, be made without delay.

New trial denied.

IF ONE COVENANTS FOR RESULT OF SUIT BETWEEN OTHERS, the record of the judgment in that suit will be conclusive evidence against him: *Craig v. Ward*, 1 Abb. App. Dec. 459; S. C., 3 Abb. Pr. (N. S.) 237; S. C., 3 Keyes, 391; *Monroe v. Delavan*, 26 Barb. 21; *Jarvis v. Sewall*, 40 Id. 465; *Bates v. Stanton*, 1 Duer, 88; *Catlin v. Hansen*, Id. 330; *Mayor v. Troy & L. R. R. Co.*, 3 Lans. 275; *Thomas v. Hubbell*, 15 N. Y. 407; *Bridgeport Ins. Co. v. Wilson*, 34 Id. 281; *Binsse v. Wood*, 37 Id. 530; *Thompson v. MacGregor*, 81 Id. 597; *Murray v. Lovejoy*, 2 Cliff. 202, all citing the principal case.

MOTION FOR NEW TRIAL ON GROUND OF SURPRISE comes too late after the judgment is perfected: *Peck v. Hiler*, 30 Barb. 663; *Nash v. Wetmore*, 33 Id. 158; *Barnes v. Roberts*, 5 Bow. 78; *Jellinghaus v. New York Ins. Co.*, Id. 681; *Tracy v. Altmyer*, 46 N. Y. 602; *Stikwell v. Staples*, 4 Rob. 640, all citing the principal case.

WHERE MATTER RESTS IN DISCRETION OF THE COURT its decision is not one to which an exception can be properly taken: *Bedell v. Powell*, 13 Barb. 184; *People v. Stockholm*, 1 Park. 428; *Dibble v. Rogers*, 2 Mich. 407, all citing the principal case.

TAXES NECESSARILY PAID BY MORTGAGEE to preserve his security may be added to his mortgage: *Robinson v. Ryan*, 25 N. Y. 327; *Madison Ave. Church v. Oliver St. Church*, 41 Supr. Ct. 383.

In *Blake v. Howe*, 15 Am. Dec. 681, it was decided that a new trial on the ground of surprise will not be granted, unless it appears that the moving party was injured by the surprise.

SHELDON v. BENHAM.

[4 HILL, 129.]

NOTARY PUBLIC CAN NOT DELEGATE HIS OFFICIAL AUTHORITY.

MEMORANDA OF DECEASED TELLER OF BANK, made in the usual course of his employment, are admissible in evidence in proving a demand by him on the maker of a note, and notice to the indorsers. And where such memoranda are abbreviated and elliptical, an expert may testify as to their meaning.

WHERE NOTE FALLS DUE ON FOURTH OF JULY, demand should be made on the third.

SERVICE OF NOTICE OF PROTEST OF NOTE can not be made through the post-office where both parties reside in the same village.

ASSUMPSIT tried at the Yates circuit. The action was against Benham and Charles Hubbard as indorsers on a note. When the note fell due, one Coffin was a notary at Geneva, and one Hendy was a teller in the bank, and at the same time acted as a clerk of the notary. The note was noted by Hendy. Both Coffin and Hendy were dead at the time of the trial. A book kept by the latter contained the following memorandum in relation to the note:

“W. W. Staats—Ch’s Hubbard, } 1 April, 1837, 8 P. M.
 George Benham, } To W. Babcock, Penn
 Moses Hubbard, } Yan P. O. Penn Yan.
 Wm. Babcock. } \$300. 6s.
 July 4, 1837, lodged in P. O.”

On the face of the note was the following entry in Hendy’s handwriting: “Noted July 4, ’36. J. A. C., N. P., fees 6s.” The bookkeeper of the bank testified in relation to these memoranda as follows: “I understand ‘1 April, 1837,’ to mean the date of the note, and ‘July 4, 1837,’ to mean the time it was noted; the words ‘To W. Babcock, Penn Yan P. O., Penn Yan,’ mean that notice of the protest of the note had been sent by mail, directed to William Babcock at Penn Yan; the figures ‘\$300,’ mean the amount of the note; the name ‘W. W. Staats,’ indicates the maker, and ‘Ch’s Hubbard, George Benham, Moses Hubbard, and Wm. Babcock,’ the indorsers; ‘Noted July 4, ’36, J. A. C., N. P., fees 6s.,’ means that the note had been protested July 4, 1836, by John A. Coffin, notary public, and that his fees were seventy-five cents; the figures ‘36’ in ‘July 4, ’36,’ are evidently a mistake, and should have been July 4, ’37.” There was a verdict for the plaintiff, and the defendant moved for a new trial. The other facts appear from the opinion.

H. Wells, for the defendant.

A. Gardiner, for the plaintiff.

By Court, BRONSON, J. It is quite clear that the notary could not delegate his official authority to a clerk: *Onondaga Co. Bank v. Bates*, 3 Hill, 53. But that is not the question. The plaintiff claims nothing on the ground of an official act of the notary. The question is upon demand and notice, and the plaintiff resorts to the memoranda of Hendy, who had died before the trial. He was a teller in the bank as well as clerk to the notary, and it matters not whether he attended to business of this kind on the retainer of the notary, or as a part of his duty to the bank. It is enough that he acted on this occasion in the

usual course of his employment, and being dead, the entries which he made at the time were properly received in evidence. The rule for admitting them is not confined to entries made by public officers: *Nichols v. Goldsmith*, 7 Wend. 160; *Welsh v. Barrett*, 15 Mass. 380. Where there is any room for doubt, it is for the jury to say how much the entries prove. I see no objection to the testimony of the book-keeper in relation to these memoranda. He was not called to give a construction, or to declare the legal effect of a written instrument; but as a person skilled in such matters, to tell the jury what words these short entries stood for. It is not unlike the case of an instrument written in a foreign tongue, where a translator may be called in to tell the jury how the instrument reads. I think the evidence was properly received.

As the fourth of July is a public holiday, the demand should have been made on the third: *Ransom v. Mack*, 2 Hill, 587 [38 Am. Dec. 602]. But the objection taken at the trial did not go to the day on which the demand was made, but to the manner in which the business was done. If objection had been taken to the day, it may be that the plaintiff would have avoided the difficulty by giving further evidence.

It seems to have been assumed on the trial that Babcock owned the note, and sent it to the bank, where it was made payable, for collection. Notice was sent to Babcock, the last indorser, with notices for the other indorsers; and if he was not mistaken as to the proper mode of service, he gave notice to the defendant, Benham, on the same day, or the day after he received advices from the bank. Either day was sufficient: *Howard v. Ives*, 1 Hill, 263; *Bank of the United States v. Davis*, 2 Id. 451. But as Babcock and the defendant, Benham, both lived in the same village, I think the service should have been personal, or by leaving the notice at the dwelling-house or place of business of the indorser, and that service through the post-office was not sufficient. The post-office is not a place of deposit for notices to indorsers, except where the notice is to be transmitted by mail to another office: *Ransom v. Mack*, 2 Hill, 587 [38 Am. Dec. 602]. None of our cases have gone further than that.

New trial granted.

NOTE FALLING DUE ON SUNDAY: See note to *Salter v. Burt*, 32 Am. Dec. 531, and cases there cited.

NOTARY CAN NOT BASE A PROTEST UPON A PRESENTMENT BY HIS CLERK: *Carmichael v. Bank of Pa.*, 35 Am. Dec. 408; *Sacridier v. Brown*, 3 McLean, 483, citing the principal case.

SERVICE OF NOTICE BY DROP LETTER IS NOT SUFFICIENT: *Newberry v. Trowbridge*, 4 Mich. 395; *Shelburne Falls Nat. Bk. v. Townsley*, 102 Mass. 182; *Stanton v. Kline*, 16 Barb. 14; *Van Vechten v. Pruyn*, 9 How. Pr. 224; S. C., 13 N. Y. 551; *Bartlett v. Robinson*, 39 Id. 194; *Whiting v. Burt*, 3 N. Y. Leg. Obs. 33, all citing the principal case; *Miranda v. City Bank*, 26 Am. Dec. 493. But in *Vigers v. Curton*, 33 Id. 575, it was decided that notice to an indorser may be given by mail, although he may reside in the same place at which the protest was made, if, after due diligence, his actual residence could not be discovered.

ENTRIES MADE IN USUAL COURSE OF PROFESSIONAL EMPLOYMENT, or of clerkship or agency, are, after the death of the person making them, admissible in evidence: *Arms v. Middleton*, 23 Barb. 573; *Ocean Nat. Bk. v. Carl*, 9 Hun, 241; *Gauvry v. Doane*, 51 N. Y. 91; *Kennedy v. Doyle*, 10 Allen, 168, all citing the principal case. See also *Bell v. Perkins*, 14 Am. Dec. 745, note 751.

WHERE CHARACTERS IN A WRITING ARE OBSCURE, expert testimony is admissible to aid in deciphering them: *Arthur v. Roberts*, 60 Barb. 588; *Dubois v. Baker*, 30 N. Y. 361, both citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Shayler v. Mitz*, 4 Allen, 352, to the point that service of notice by mail, by note posted on the day the note became due, is sufficient; and in *West River Bank v. Taylor*, 7 Bosw. 479, to the point that where an indorser and the party seeking to charge him reside in different places, service of notice through the mail will be sufficient.

TAYLOR v. PORTER.

[4 HILL, 140.]

PRIVATE PROPERTY CAN NOT BE TAKEN FOR A PRIVATE PURPOSE, without consent of the owner.

PRIVATE ROAD CAN NOT BE LAID OUT WITHOUT THE CONSENT of the owner of the land over which it passes, and a statute which authorizes a private road to be laid out over the land of a person, without his consent, is unconstitutional and void. NELSON, C. J., dissenting.

LEGISLATURE CAN EXERCISE SUCH POWERS ONLY AS HAVE BEEN DELEGATED to it, and when it goes beyond that limit its acts are utterly void.

GENERAL GRANT OF LEGISLATIVE POWER DOES NOT AUTHORIZE the legislature to take the property of one person and give it to another, either with or without compensation.

THE PHRASE "BY THE LAW OF THE LAND" means according to the course of the common law; and the words "due process of law" mean a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property.

TRESPASS for breaking and entering the plaintiff's close, and for making and laying out a private road through and over the same. Plea in justification, that the private road referred to was laid out by the commissioners of highways, under and in accordance with the act authorizing the laying out of private roads. Demurrer and joinder.

G. H. Mumford, for the plaintiff.

N. Hill, jun., for the defendants.

BRONSON, J. Every person liable to be assessed for highway labor, may apply to the commissioners of highways of the town in which he resides to lay out a road. Whenever application is made to the commissioners for a private road, they are to summon twelve freeholders of the town to meet on a day certain, of which notice must be given to the owner or occupant of the land through which it is proposed to lay out the road. The freeholders, when met and sworn, are to view the lands through which the road is applied for, and if they determine that the road is necessary, they are to make and subscribe a certificate in writing to that effect, and the commissioners are required thereupon to lay out the road, and cause a record of it to be made in the town clerk's office. The damages of the owner of the land through which the road is laid, if not adjusted by agreement, are to be assessed by a jury of six freeholders of some other town, and are to be paid by the person applying for the road. "Every such private road, when so laid out, shall be for the use of such applicant, his heirs and assigns; but not to be converted to any other use or purpose than that of a road. Nor shall the occupant or owner of the land through which such road shall be laid out, be permitted to use the same as a road, unless he shall have signified his intention of so making use of the same, to the jury or commissioners who ascertained the damages sustained by laying out such road, and before such damages were so ascertained:" 1 R. S. 513, secs. 54, 77-79. The road is paid for and owned by the applicant. The public has no title to nor interest in it. No citizen has a right to use the road as he does the public highway. He can only use it when he has business with the road owner or some other lawful occasion for going to the land intended to be benefited by the road. He can only justify an entry on the road, when he could justify an entry on the land on account of which the road was laid out. Even the owner of the land over which the road passes, unless he has given notice of such an intention before the damages are assessed, has no right to use the road for his own purposes; and if he does so, or if his fences encroach upon the road, the owner of the road may have an action against him: *Lambert v. Hoke*, 14 Johns. 383; *Herrick v. Stover*, 5 Wend. 580. In short, the road is the private property of the applicant. In the words of

the statute, the road "shall be for the use of such applicant, his heirs and assigns."

This right of way is an incorporeal hereditament, in which the owner has an estate of inheritance. The owner of the land over which the road is laid has not lost the entire fee, but he has lost the beneficial use and enjoyment of his property forever. It is not, however, material to inquire what quantum of interest has passed from him. It is enough that some interest, some portion of his estate, no matter how small, has been taken from him without his consent. The property of A. is taken, without his permission, and transferred to B. Can such a thing be rightfully done? Has the legislature any power to say it may be done?

I will not stop to inquire whether the damages must not be paid before the title will pass. The difficulty lies deeper than that. Whatever sum may be tendered, or however ample may be the provision for compensation, the question still remains, can the legislature compel any man to sell his land or his goods, or any interest in them, to his neighbor, when the property is not to be applied to public use? Or, must it be left to the owner to say, when, to whom, and upon what terms he will part with his property, or whether he will part with it at all? The right to take private property for public purposes is one of the inherent attributes of sovereignty, and exists in every independent government. Private interests must yield to public necessity. But even this right of eminent domain can not be exercised without making just compensation to the owner of the property: Const., art. 7, sec. 6. And thus, what would otherwise be a burden upon a single individual, has been made to fall equally upon every member of the state. But there is no provision in the constitution that just compensation shall be made to the owner when his property is taken for private purposes; and if the power exists to take the property of one man without his consent and transfer it to another, it may be exercised without any reference to the question of compensation. The power of making bargains for individuals has not been delegated to any branch of the government, and if the title of A. can, without his fault, be transferred to B., it may as well be done without as with a consideration. This view of the question is sufficient to put us upon the inquiry, where can the power be found to pass such a law as that under which the defendants attempt to justify their entry upon the plaintiff's land? It is not to be presumed that such a power exists, and those who set it up should tell where it may be found.

Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the state who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the legislature to take the property of A. and give it to B., either with or without compensation? Only one clause of the constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that "the legislative power of this state shall be vested in a senate and assembly." It is readily admitted that the two houses, subject only to the qualified negative of the governor, possess all "the legislative power of this state;" but the question immediately presents itself, what is that "legislative power," and how far does it extend? Does it reach the life, liberty, or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare?

In *Wilkinson v. Leland*, 2 Pet. 657, Mr. Justice Story says: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention." He added: "We know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced." See also 2 Kent's Com. 13, 340, and cases there cited. The security of life, liberty, and property, lies at the foundation of the social compact; and to say that this grant of "legislative power" includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power

of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the legislature with despotic power; and such is the extent of their authority if they can take the property of A., either with or without compensation, and give it to B. "The legislative power of this state" does not reach to such an unwarrantable extent. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power. Such, at least, are my present impressions.

But the question does not necessarily turn on the section granting legislative power. The people have added negative words, which should put the matter at rest. "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers:" Const., art. 7, sec. 1. The words "by the law of the land," as here used, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: "You shall be vested with 'the legislative power of the state;' but no one 'shall be disfranchised, or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose;" in other words, "You shall not do the wrong, unless you choose to do it." The section was taken with some modifications from a part of the twenty-ninth chapter of Magna Charta, which provided, that no freeman should be taken, or imprisoned, or be disseised of his freehold, etc., but by lawful judgment of his peers, or by the law of the land. Lord Coke in his commentary upon this statute says, that these words, "by the law of the land," mean "by the due course and process of law;" which he afterwards explains to be, "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law:" 2 Inst. 45, 50.

In North Carolina and Tennessee, where they have copied almost literally this part of the twenty-ninth chapter of Magna Charta, the terms "law of the land" have received the same construction: *Hoke v. Henderson*, 4 Dev. L. 1 [25 Am. Dec. 677]; *Jones v. Perry*, 10 Yerg. 59 [30 Am. Dec. 430]; and see 3 Story on Const. U. S. 661; 2 Kent's Com. 13. The meaning of the section

then seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It can not be done by mere legislation.

But if there can be a doubt upon the first section of the seventh article, there can, I think, be none that the seventh section of the same article covers the case. "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." In the *Matter of Albany Street*, 11 Wend. 149 [25 Am. Dec. 618], where it was held that private property could not be taken for any other than public use, Chief Justice Savage went mainly upon the implication contained in the last member of the clause just cited. He said: "The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the private use of another." And in *Bloodgood v. The Mohawk & Hudson R. R. Co.*, 18 Id. 59 [31 Am. Dec. 313], Mr. Senator Tracy said, the words should be construed "as equivalent to a constitutional declaration, that private property, without the consent of the owner, shall be taken only for the public use, and then only upon a just compensation." I feel no disposition to question the soundness of these views; but still it seems to me that the case stands stronger upon the first member of the clause: "No person shall be deprived of life, liberty, or property, without due process of law." The words "due process of law," in this place, can not mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty, and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation. There must be "due process of law." Perhaps the whole clause should be read together: *Matter of John and Cherry Streets*, 19

Id. 659; and then if it do not, as I have supposed, amount to a direct prohibition against taking the property of one and giving it to another, it contains, at the least, an implication too strong to be resisted that such an act can not be done.

Of course, I shall not be understood as saying that a trial and judgment are necessary in exercising the right of eminent domain. When private property is taken for public use, the only restriction is, that just compensation shall be made to the owner. But when one man wants the property of another, I mean to say that the legislature can not aid him in making the acquisition. This question is only new with us in its application to private roads. That a statute is unconstitutional and void which authorizes the transfer of one man's property to another, without the consent of the owner, and although compensation is made, was adjudged by this court in the *Matter of Albany Street*, 11 Wend. 149 [25 Am. Dec. 618]; and again in the *Matter of John and Cherry Streets*, 19 Id. 659. The same doctrine was held by the chancellor in *Varick v. Smith*, 5 Paige, 187 [28 Am. Dec. 417]; and it was admitted by all the members of the court of errors who delivered opinions in *Bloodgood v. The Mohawk & Hudson R. R. Co.*, 18 Id. 9 [31 Am. Dec. 813]. I might have contented myself with referring to these cases as settling the question; but in so grave a matter as that of declaring an act of the legislature unconstitutional and void, I wished very briefly to assign the reasons which had conducted me to that conclusion.

There can not be a very great number of private roads in the state; and as to most of those which exist, it is probable that the land-owners have in one form or another consented to their use. And when we consider how liberally public roads have already been opened, and how easily they may be obtained when wanted, there can not be many individuals who will be affected by our decision. But whatever consequences may follow, I am of opinion that a private road can not be laid out without the consent of the owner of the land over which it passes.

COWEN, J., concurred.

NELSON, C. J., dissented.

THE PRINCIPAL CASE has been very extensively cited, both by the courts of New York and by those of other states.

PROPERTY OF ONE PERSON CAN NOT BE TAKEN AND GIVEN TO ANOTHER FOR A private purpose: *Hay v. Cohoes Co.*, 3 Barb. 47; *People v. Supervisors of Westchester*, 4 Id. 73; *Griffin v. Martin*, 7 Id. 308; *Heyward v. Mayor etc. of N. Y.*, 8 Id. 488; *People v. White*, 11 Id. 31; *People v. Toynbee*, 20 Id. 199;

S. C., 2 Park. 344; *Heath v. Hubbell*, 6 Daly, 186; *Tonawanda R. R. Co. v. Munger*, 5 Denio, 284; *Sackett v. Andross*, 5 Hill, 380; *Baker v. Braman*, 6 Id. 48; *Baldwin v. Mayor etc. of N. Y.*, 2 Keyes, 395; *Powers v. Bergen*, 6 N. Y. 368; *Wynehamer v. People*, 13 Id. 391; *People v. Smith*, 21 Id. 599; *New York & Onwego M. R. R. Co. v. Van Horn*, 57 Id. 477; *Davidson v. Mayor etc. of N. Y.*, 2 Rob. 280; *Billings v. Hall*, 7 Cal. 13, all citing the principal case.

LEGISLATURE CAN EXERCISE ONLY SUCH POWERS as have been delegated to it: *Briggs v. MacKellar*, 2 Abb. Pr. 61; *Pumpelly v. Owego*, 45 How. Pr. 247, both citing the principal case. See also, on this subject, note to *Oochran v. Van Surlay*, 32 Am. Dec. 589.

"DUE PROCESS OF LAW."—The principal case has been cited as having given a judicial interpretation of this phrase in the following cases: *People v. Mayor etc. of Brooklyn*, 9 Barb. 552; *People v. Toynbee*, 20 Id. 199; *People v. Berberich*, 11 How. Pr. 322; *Clark v. Rochester*, 13 Id. 209; *In Matter of Adrian Janes*, 30 Id. 454; *Matter of Beebe*, 20 Hun, 465; *Sullivan v. Decker*, 12 N. Y. Leg. Obs. 115; S. C., 1 E. D. Smith, 709; *Embury v. Conner*, 3 N. Y. 517; *Burch v. Newbury*, 10 Id. 397; *Westervelt v. Gregg*, 12 Id. 209; *People v. Draper*, 15 Id. 209; *Hibbard v. People*, 4 Mich. 129; *Weimer v. Bunbury*, 30 Id. 210; *Cohen v. Wright*, 22 Cal. 318; *Green v. Briggs*, 1 Curt. 326; *Murray v. Hoboken L. & I. Co.*, 18 How. (U. S.) 280; and in *Sears v. Cottrell*, 5 Mich. 279, it is cited to the point that the legislature can not legalize an invasion of the due process of law.

"LAW OF THE LAND."—The principal case is cited as having judicially interpreted the meaning of this phrase, in the following cases: *White v. White*, 5 Barb. 482; *Guilford v. Cornell*, 18 Id. 634; *People v. Haws*, 37 Id. 455; *Traver v. Traver*, 3 How. Pr. 353; *White v. White*, 4 Id. 109; *People v. Haws*, 24 Id. 152; *Jones v. Robinson*, 8 Gray, 345; *Denny v. Mattoon*, 2 Allen, 382. See, also, on this subject, *Jones v. Perry*, 30 Am. Dec. 430; *Bank of the State v. Cooper*, 24 Id. 517, note 537, where the subject is discussed at some length.

STATUTE AUTHORIZING COMMISSIONERS TO LAY OUT PRIVATE ROAD over lands of a person, without his consent, is unconstitutional: *Dempsey v. Kipp*, 62 Barb. 314; *White v. White*, 4 How. Pr. 108; *Dempsey v. Kipp*, 61 N. Y. 468; *Nesbitt v. Trumbo*, 39 Ill. 116, all citing the principal case.

PRIVATE PROPERTY CAN NOT, BY MERE LEGISLATION, BE TAKEN from one person and given to another: *Roderigas v. East River Savings Institution*, 48 How. Pr. 174; S. C., 43 Supr. Ct. 237; *Rockwell v. Nearing*, 35 N. Y. 306; *People v. Deyoe*, 2 Thomp. & C. 148; *Cook v. South Park Commissioners*, 61 Ill. 118; *Osborn v. Nicholson*, 13 Wall. 662, all citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED to these points in the following cases: That property can not be taken by the legislature without a forensic trial and judgment: *Campbell v. Evans*, 45 N. Y. 358; that the power of making bargains for individuals has not been conferred upon any department of the government: *People v. Batchelor*, 53 Id. 141; *Weimer v. Douglas*, 6 Thomp. & C. 519; that private property can not be taken for a private use, even upon making due compensation: *Matter of Deansville Cemetery Association*, 66 N. Y. 571; that no length of time during which a course of legislation has been continued, will protect any law from the condemnation of a judicial tribunal, when its conflict with the constitution is brought distinctly to the test: *Hartwell v. Armstrong*, 19 Barb. 170; that the legislature can not authorize the taking of private property without compensation: *People v. Toynbee*, 12 How. Pr. 250; *Wynehamer v. People*, 2 Park. 454; that the senate and assembly,

subject to the qualified negative of the governor, possess all the legislative power of the state: *Holly v. Bengen*, 3 Code R. 194; that the power of the legislature is not unrestricted: *People v. Collins*, 3 Mich. 394; that an act of the legislature will not be declared unconstitutional on slight grounds: *Ortman v. Greenman*, 4 Mich. 294. The principal case is also distinguished in the following cases: *Sherman v. Buick*, 32 Cal. 254; *Denham v. County Commissioners*, 108 Mass. 206; *Norworth v. Bergh*, 16 How. Pr. 319.

CASES
IN THE
COURT OF ERRORS
OF
NEW YORK.

HUNT v. AMIDON.

[4 HILL, 345.]

ALL VERBAL CONTRACTS MADE BY A GRANTOR, AT OR BEFORE EXEMPTION OF THE DEED, are merged in the conveyance and the covenants contained therein for the protection of the title of the grantee.

COVENANTS FOR QUIET ENJOYMENT RUN WITH THE LAND, and pass to a purchaser by a quitclaim deed from the grantee.

GRANTEE OF LAND UNDER DEED WITH COVENANT FOR QUIET ENJOYMENT has no right to give it up voluntarily to a stranger who claims by title paramount, nor even to pay off an alleged incumbrance, without suit, and then resort to his action upon the covenant.

WHERE MERE SURETY FOR ANOTHER IS COMPELLED TO PAY DEBT, which the latter in equity and justice ought to have paid, he is entitled to relief against him who was in fact the principal debtor, whether he became such surety by actual contract or by operation of law.

DECREE OF FORECLOSURE AND SALE UNDER IT AMOUNT TO AN EVICTION, in equity, although the owner in possession becomes the purchaser at the sale, where the mortgage foreclosed was one which his grantor was, by a covenant in his deed, bound to pay; and therefore the payment made by such owner will be regarded as made by coercion of legal process for the benefit of his grantor, which the former may recover back from the latter in the equitable action of *assumpsit* for money paid for his use.

ERROR to the supreme court, where Hunt sued Amidon for money paid to the latter's use. The action was first tried at the Rensselaer circuit in 1839. A verdict was then rendered for the plaintiff. The case was then appealed to the supreme court, which, in 1841, granted a new trial. On the second trial at the same circuit, in 1841, the plaintiff offered to prove the facts proved at the former trial, which are briefly these: That in 1824

the defendant conveyed to one Wheeler forty-three acres of land, and Wheeler at the same time gave back a bond and mortgage thereon to the defendant; in 1825 the defendant assigned the mortgage to one Taylor; in 1828 Wheeler re-conveyed to the defendant by quitclaim deed; in 1830 the defendant conveyed to one Babcock, with covenant for quiet enjoyment; in 1834 Babcock conveyed to the plaintiff by quitclaim deed; Taylor foreclosed the mortgage, and the farm was sold under the decree and bought in by the plaintiff. This action was brought to recover from the defendant the amount paid by the plaintiff to and for the use of the defendant. At the first trial the plaintiff also gave evidence tending to show that the defendant promised to Babcock, when he conveyed to him, to pay off the mortgage. At the second trial the plaintiff proposed to show, in addition, that in 1828 the defendant executed to Wheeler a bond, conditioned to indemnify the latter against the bond and mortgage given by him to the defendant in 1824. The defendant objected on the ground that all the evidence offered was inadmissible. The circuit judge sustained the objection and nonsuited the plaintiff, who thereupon excepted, and upon judgment being rendered against him, sued out a writ of error.

D. L. Seymour and S. Stevens, for the plaintiff in error.

D. Gardner and M. T. Reynolds, for the defendant in error.

WALWORTH, Chancellor. It appears by the report of this case, 1 Hill, 147, that, upon the first trial, the circuit judge admitted all or nearly all the evidence which was objected to and rejected on the last trial; and the plaintiff had a verdict, which was set aside by the supreme court. The decision stated in this bill of exceptions was therefore made in conformity to the previous opinion of the supreme court. It presents two questions for our consideration: 1. Whether the judge was right upon the former trial in receiving parol evidence to show that, at the time of the sale and conveyance from Amidon to Babcock, there was a verbal agreement, in addition to the written warranty contained in the deed, that Amidon should pay off the mortgage which then belonged to Taylor the assignee; and 2. Whether if such evidence ought to have been excluded, the other facts proved on the first trial were sufficient to entitle the plaintiff to a verdict upon the common count for money paid to and for the use of the defendant.

Upon the first question I think the learned judge who delivered the opinion of the supreme court was clearly right in sup-

posing that all verbal contracts, made at or before the sale, must be considered as merged in the written contract—the deed of conveyance and the covenants contained therein for the protection of the title of the grantee. The covenant for quiet enjoyment itself shows that it was the understanding of the parties that Amidon, the grantor, assumed the payment of all liens and incumbrances upon the land, so far as was necessary to protect Babcock, and those who might afterwards become the owners of the premises or any part of them under him, in the quiet enjoyment of the land. But the nature and extent of Amidon's liability must depend upon the covenants in the deed itself. Those covenants run with the land. They passed to the plaintiff Hunt, by the quitclaim deed to him from Babcock, in October, 1834; so as to give the plaintiff the same rights as against Amidon, that he would have had if the deed from the latter, containing the covenant for quiet enjoyment, had been given directly to Hunt himself: *Middlemore v. Goodale*, Cro. Car. 503; *Campbell v. Lewis*, 3 Barn. & Ald. 392; *Spencer's Case*, 5 Co. 16, Fraser's ed., note a; Shep. Touch. 176; Platt on Cov. 523. The fact that the plaintiff took only a quitclaim deed, left him without any personal claim against his immediate grantor. But his rights as assignee of Babcock, upon the covenants in the deed from Amidon, are the same as they would have been if his deed from Babcock had also contained a similar covenant for quiet enjoyment.

From this view of the case it is perfectly evident that if Hunt, instead of purchasing in the premises himself under the decree of foreclosure, had suffered them to be sold to a third person, and had delivered up the possession to the purchaser as directed by the decree of foreclosure, he could immediately have brought an action at law against Amidon as assignee of the covenant for quiet enjoyment contained in the deed from Amidon to Babcock; in which action he would have recovered the whole one thousand two hundred dollars mentioned in that deed as the consideration for the premises. The defendant, therefore, has been clearly benefited by the plaintiff's bidding in the premises himself, at the master's sale, for the four hundred and seventy dollars which was due upon the decree for the debt and costs on the mortgage foreclosure. The question then arises, whether, upon equitable principles, the plaintiff was bound to stand aside and suffer his land to be sacrificed to a stranger for this smaller sum, and then to resort to his action at law upon the covenant in the deed to Babcock; or whether the decree of foreclosure

and sale, which undoubtedly contained the usual directions, as provided for in the one hundred and thirty-fifth rule of the court of chancery, that the purchaser should be let into possession upon production of the master's deed, and the actual sale under that decree, were not of themselves equivalent, in equity at least, to an actual eviction of Hunt by an action at law founded upon a title paramount to that which Amidon conveyed to Babcock with warranty.

It is at least doubtful whether an action at law could have been sustained upon this covenant for quiet enjoyment, without showing an actual eviction. And I admit that, under such a covenant, the grantee of the land has no right to give it up voluntarily to a stranger, who claims by title paramount, or even to pay off an alleged incumbrance without suit, and then resort to his action upon the covenant in the deed. But it is perfectly clear in this case, that the plaintiff stood in the place of a mere surety for the amount due on the mortgage, his land being holden for the amount; and that Amidon, not only by the covenant in his deed, but also by virtue of his previous bond of indemnity to Wheeler, was in fact the real debtor. For, as between Hunt and Wheeler, Hunt, who had derived title to the land from or through a deed which was subsequent to the bond of indemnity to Wheeler, could not, in equity, have been permitted to take an assignment of the bond and mortgage from Taylor, and proceed to collect the money from Wheeler by a suit on the bond. The value of the mortgaged premises being in equity the primary fund for the payment of the debt at the time of the conveyance from Amidon to Babcock, it was the primary fund for that purpose as between Wheeler and the plaintiff, the owner of the mortgaged premises, at the time the decree of foreclosure was obtained.

Again, it is an equitable principle of very general application, that where one person is in the situation of a mere surety for another, whether he became so by actual contract or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor. And when courts of law, a long time since, fell in love with a part of the jurisdiction of the court of chancery, and substituted the equitable remedy of an action of *assumpsit* upon the common money counts, for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been com-

pelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in this equitable action of *assumpsit* as for money paid, laid out, and expended for his use and benefit.

The case of *Exall v. Partridge et al.*, 8 T. R. 308, was a case of this description. There, the carriage of the plaintiff *Exall*, being left upon leasehold premises, was distrained for rent reserved in a lease to the defendants, which rent they had covenanted with the landlord to pay; and the plaintiff had been compelled to pay the rent to prevent his carriage from being sold. In that case, it will be perceived, there was no privity of contract between the plaintiff and the defendants, nor any request that he should pay the rent for them. But by the seizure of his carriage upon the demised premises, he was placed in the situation of a surety for the payment of the rent which they, as the real debtors, were in equity and justice bound to pay; and he was allowed to recover the amount thus paid, in the equitable action of *assumpsit* for money paid for their use: See also *Taylor v. Zamira*, 2 Marsh. 220, and *Carter v. Carter*, 2 Moo. & P. 732. The legislature of this state has adopted the same principle where one person is compelled to pay taxes to save his land or other property from being lost, which taxes another person ought in justice and equity to have paid: 1 R. S. 410, sec. 73; *Id.* 419, sec. 6.

Under the peculiar circumstances of this case, and without reference to the supposed parol agreement to pay off the mortgage, I think the decree of foreclosure, and the sale under it, was in equity an eviction; and that the money paid by the plaintiff to save his property from being sacrificed, was a payment of money by the coercion of legal process for the use and benefit of the defendant, *Amidon*. The plaintiff should, therefore, have been allowed to recover it back in this equitable action of *assumpsit* for money paid and expended for his use.

The case of *McCrea v. Purmort*, 16 Wend. 460; S. C., 5 Paige, 620, shows that, upon a bill filed in the court of chancery to compel the principal debtor to pay off the mortgage, and thus save the property from being sacrificed under a decree of foreclosure, that court may grant the appropriate relief. And if so, I can see no good reason why the plaintiff, *Hunt*, should not be permitted to bid in the property himself under the decree of foreclosure, and then recover back the money thus paid in this form of action—the amount being much less than *Amidon* would have been liable to pay, under his covenant of warranty, if the property had been purchased by a third person.

For these reasons, I shall vote to reverse the judgment of the supreme court.

Root, senator, also delivered a written opinion in favor of reversing the judgment of the supreme court.

All the members of the court, seventeen being present, concurring in this result, the judgment of the supreme court was unanimously reversed.

COVENANT FOR QUIET ENJOYMENT RUNS WITH LAND: *Buck v. Binninger*, 3 Barb. 403; *Ten Eyck v. Craig*, 5 Thomp. & C. 71, both citing the principal case; *Logan v. Moulder*, 33 Am. Dec. 339.

VERBAL AGREEMENTS BECOME MERGED IN WRITTEN CONTRACT: *Miller v. Avery*, 2 Barb. Ch. 593, citing the principal case; *Atwood v. Cobbs*, 26 Am. Dec. 657.

EVICION IS NECESSARY in action on covenant of warranty: *Garlock v. Lane*, 15 Barb. 363, citing the principal case; *Whitbeck v. Cook*, 8 Am. Dec. 272. What is sufficient evidence of eviction: See *Hanson v. Buckner*, 29 Id. 401. Foreclosure and sale under it amount in equity to an eviction: *Cowdrey v. Coit*, 44 N. Y. 387.

THE PRINCIPAL CASE IS CITED in these cases to the following points: In *Moyer v. Shoemaker*, 5 Barb. 321, that while there is an open covenant of warranty, the remedy of the party must be confined to that; in *Hannay v. Pell*, 3 E. D. Smith, 438, that at law a surety has no claim against his principal until he has paid something on the liability he has incurred.

SURETY WHO HAS PAID DEBT is entitled to subrogation to the rights of the creditors of his principal: See *Pott v. Nathans*, 37 Am. Dec. 456, note 458, where other cases are collected.

In the case of *Fowler v. Poling*, 6 Barb. 168, Edmonds, J., referring to the principal case, said: "It is true the chancellor said in *Hunt v. Amidon*, 4 Hill, 345, in the court of errors, that the grantee had no right to give up voluntarily to a stranger claiming by title paramount; but his remark was *obiter*, and he was evidently mistaken." The principal case is distinguished in *McCoy v. Lord*, 19 Barb. 21.

PROSSER v. LUQUEER.

[4 HILL, 420.]

JOINT ACTION ON NEGOTIABLE NOTE MAY BE BROUGHT against the maker and one who before the delivery thereof to the payee indorsed thereon these words: "For value received, I guarantee the payment of the within note, and waive notice of non-payment." Such guaranty amounts to an indorsement, and therefore the guarantor may, under the statute, be sued jointly with the makers.

PAROL EVIDENCE IS NOT ADMISSIBLE TO SHOW THAT A PARTY TO A NOTE intended to contract for a different liability from that which is expressed in his written undertaking.

ERROR to the supreme court. The opinion states the case.

M. T. Reynolds, for the plaintiff in error.

Willis Hall, for the defendants in error.

WALWORTH, Chancellor. Edson and Arnold, who were copartners, made a promissory note payable to Parsons or bearer. Before the delivery of the note to Parsons, Prosser, the plaintiff in error, made an indorsement on it bearing even date therewith; by which indorsement, for value received, he guaranteed the payment of the note generally, and waived notice of non-payment. When the note became due, payment was demanded of the makers, but they did not pay the same. F. T. Luqueer and others, as the bearers and owners of the note, thereupon brought a joint action against Arnold & Edson and Prosser, and declared on the common money counts, and served a copy of the note and indorsement with their declaration; as directed by the statute authorizing a joint suit to be brought against the drawers, makers, indorsers, and acceptors of a bill of exchange or a promissory note: 2 R. S., 2d ed., 274, secs. 6, 7. And the only question is, whether they were entitled to recover against Prosser, the plaintiff in error, in this form of action.

If the undertaking of Prosser can not be considered as a promissory note in itself, so as to render him liable as maker; or as an indorsement of the note with a waiver of notice, so as to entitle the bearers of the note to recover against him as an indorser, this joint suit upon the money counts can not be sustained. But if he is liable to the bearers of the note either as maker or indorser, and could have been declared against as such in a separate suit against him, I think the statute is broad enough to entitle them to recover in this form of action. For the legislature unquestionably intended to authorize a joint suit to be brought against all the parties who were liable as drawers, indorsers, makers, and acceptors of the same paper. It is not necessary, therefore, to inquire whether Arnold & Edson and Prosser could, at the common law, have been all sued, in one action, as joint makers of the note in question. In this case, if the legal liability of Prosser did not appear upon the instrument served with the declaration, I think the parol evidence of the agreement of the drawers to get indorsed paper for the horse and wagon for which the note was given, could not aid the plaintiffs in the court below. For where the party to a note or bill fills up the instrument by which his liability is created, at the time he signs it, as in this case, it would be a violation of settled principles to allow parol evidence to be given for the

purpose of showing that he intended to contract for something different. And even in the case of a blank indorsement upon negotiable paper, if it can be filled up and made to operate as a general indorsement, I agree with Mr. Justice Bronson, in the case of *Seabury v. Hungerford*, 2 Hill, 80, that parol evidence ought not to be received to show that a different liability was intended to be created; and thus deprive the indorser of his right to notice of non-payment.

Where a note is payable to bearer, so that no words of transfer are necessary to entitle a subsequent holder to recover thereon in his own name, a blank indorsement is in fact and in law neither more nor less than a conditional guaranty of payment by the drawer, provided due notice of demand and non-payment is given to the indorser. And parol evidence ought not to be received, in such a case, to show that the parties intended that the indorser should be made liable absolutely, without the performance of this condition precedent. But in this case, the notice was expressly waived by the written guaranty indorsed on the note; and in addition to that, the plaintiffs proved a demand of the makers when the note became due, and that notice of non-payment to the indorser or guarantor was actually given. No parol proof of the circumstances under which the note was given was therefore necessary to entitle the holders to recover against him as such indorser or guarantor. Had the indorsement guaranteed the payment of the note to Parsons, by name, without any words of negotiability, it would probably have only operated as a special indorsement, so as to make it necessary for the holder of the note to sue the same in the name of Parsons only; and that would have enabled the guarantor to set up any legal defense which he had to the note in the hands of the person to whom such special guaranty was made. But a general guaranty, like this, upon a note payable to bearer, is in law a general indorsement of the note, with a waiver of the condition precedent of a notice of non-payment by the drawers. The plaintiff in error, therefore, was liable to the defendants in error as such indorser, and was properly sued as such in a joint suit with the makers, under the provisions of the statute on the subject of joint suits.

I also think that Prosser, the guarantor, could have been sued upon this guaranty, by the bearer of the note, as upon an absolute promise to pay the amount to the bearer when it became due; constituting the guarantor, in effect, the maker of a promissory note, payable to bearer, for the sum and at the time

specified in the note upon which this guaranty was written: *Allen v. Rightmere*, 20 Johns. 365 [11 Am. Dec. 288]; *Hough v. Gray*, 19 Wend. 202; *Ketchell v. Burns*, 24 Id. 456. Although this guaranty does not, in words, guarantee the payment to Parsons or bearer, as the indorsement did, in the case of *Ketchell v. Burns*, it does so in effect. For no person being named in the guaranty, it is an absolute promise that the amount of the note upon which it is indorsed shall be paid to the payee therein named, or to the bearer, at the time in such note specified. And the words for value received, which are in this guaranty, remove all possible objection that it is a promise to pay the debt of Edson & Arnold, and that the consideration as well as the promise must be in writing; if such an objection could have been sustained where a guaranty indorsed upon a note stated no consideration for the promise, and the form of the security was such that the guarantor could not be made liable as a mere indorser.

I think there was no error in the judgment of the court below, and that it should, therefore, be affirmed.

All the members of the court, seventeen being present, concurring in this result, the judgment of the supreme court was unanimously affirmed.

INDORSEMENT ON NOTE AT TIME OF EXECUTION, EFFECT OF: See note to *Samson v. Thornton*, 37 Am. Dec. 138, where other cases in this series are collected. The principal case is cited to the point that one who guarantees payment of a note absolutely, by an indorsement thereon made at or before delivery, becomes in legal effect a joint and several maker, in the following cases: *Enos v. Thomas*, 4 How. Pr. 51; *Leavitt v. Putnam*, 1 Sandf. 204; *Brown v. Curtiss*, 2 N. Y. 228; *Draper v. Snow*, 20 Id. 337; *Church v. Brown*, 21 Id. 321. But in *Brown v. Curtiss*, and *Draper v. Snow*, this doctrine is disapproved, as it also is in *Tinker v. McCauley*, 3 Mich. 192, where the principal case is cited on this point.

LEGAL EFFECT OF GUARANTY OF PAYMENT indorsed on a promissory note, as a distinct and independent agreement, is an absolute promise to pay if the maker fails to pay: *Curtiss v. Brown*, 2 Barb. 53; *Ellis v. Brown*, 6 Id. 285; *Leggett v. Raymond*, 6 Hill, 641, all citing the principal case.

LEGAL IMPORT OF WRITTEN CONTRACT can not be varied by parol: *Bank of Albion v. Smith*, 27 Barb. 491; *Zellweger v. Caffé*, 5 Duer, 91; *Hall v. Newcomb*, 7 Hill, 417, all citing the principal case. See also *Foley v. Cowgill*, 32 Am. Dec. 49.

THE PRINCIPAL CASE IS CITED in *Noxon v. Bentley*, 7 How. Pr. 317, to the point that in a suit upon a guaranty of payment, the neglect of the plaintiff to collect of the maker is no defense.

CURTIS v. HUBBARD.

[4 HILL, 437.]

PERSON MAY CLOSE OUTER DOOR OF HIS HOUSE AGAINST SHERIFF who comes with an execution, at the suit of a private person, to seize his goods therein; and the fact that the defendant in the execution was not in the house at the time the sheriff entered does not alter his rights.

SHERIFF WHO ENTERS HOUSE IN VIOLATION OF LAW is not justified in seizing the owner's goods therein, where such entry and seizure constitute one continuous act.

ERROR to the supreme court, where Curtis sued Hubbard for an alleged assault and battery. The court below rendered judgment for the defendant, and the plaintiff appealed. The other facts are sufficiently stated in the opinion.

G. P. Kirkland, for the plaintiff in error.

C. Tracy, for the defendant in error.

WALWORTH, Chancellor. This case presents two important questions in relation to the rights and liabilities of sheriffs and other ministerial officers, in the execution of civil process. The sheriff, after being forbidden by the owner of a house, the outer door of which was shut and fastened only by the ordinary latch, entered the house for the purpose of seizing the goods of the owner upon an execution against him; the family of such owner being in the house, although he was himself outside the door. And the sheriff, having thus entered the house, seized upon and was in the act of removing a part of the goods, when the defendant in this suit, the brother of the owner, and by his direction, assisted in expelling the sheriff from the house, and in preventing the removal of the goods therefrom.

The question, whether the defendant in an execution had the right to close the doors of his house against the sheriff, to prevent a levy upon his property, appears to have been a matter of some doubt in England at a very early day. And Fitzherbert has a note of a case said to have been decided as early as 1325, Fitzh. Abr., tit. Execution, pl. 252, H, 18 Edw. II., which is in favor of the right of the sheriff to enter the dwelling-house forcibly, to seize goods upon execution. No such case, however, is to be found in the year books of that term; nor is it stated by Fitzherbert whether the execution was in favor of the king or of a private person. The question came before the court of king's bench about one hundred and fifty years afterwards: Year Books, 18 Edw. IV., fol. 4; and the

decision was against the right of the sheriff to break the defendant's dwelling-house with the view of levying an execution upon his goods therein. Again, in the latter part of the reign of Queen Elizabeth, 1602, in the case of *Seyman v. Gresham*, Cro. Eliz. 908; S. C., *sub nom. Semayne v. Gresham*, Moore, 668; Yelv. 29, the question was presented to the queen's bench for decision, in a suit brought against the owner of a house who had closed his doors against the sheriff, so that he could not enter to take the goods therein which belonged to the defendant in the execution. Upon the first argument, according to the report of the case by Moore, Popham, C. J., and Mr. Justice Gawdy, relying upon the note of the case in Fitzherbert, were clearly of the opinion that the sheriff might break the door of the dwelling-house to execute the process against the goods. Fenner and Yelverton, the other two justices, being of a contrary opinion, no judgment was then given. But a fifth judge, Mr. Justice Williams, being appointed in the king's bench in the first year of James I., the case was again argued the next year; and Williams concurring in opinion with Fenner and Yelverton, the decision was made against the sheriff's right, as reported by Lord Coke: *Semayne's Case*, 5 Co. 91. By this decision, the right to close the outer door of the dwelling-house upon the sheriff when he came with an execution, at the suit of a private person, to levy upon goods, was placed upon the same basis as the right to prevent a similar entry when he came with like process to arrest the person of the defendant; and that appears to have been considered the settled law of England ever since. It has also been constantly recognized as the common law of the several states of the union where the English common law prevails. Nor does the fact that the defendant in the execution was not in his house at the time when the sheriff opened the door and went in contrary to his known will on the subject, alter his rights. For a man's house is his castle; not for his own personal protection merely, but also for the protection of his family and his property therein, while it is occupied as his residence.

The remaining question is, whether a sheriff, who has entered the house of another in direct violation of the law, for the purpose of arresting the owner, or seizing his goods, can be justified in consummating the wrong by arresting his person, or removing the goods, where it is all one continuous act. I think, upon authority as well as upon principle, he can not. And I fully concur in the opinion of the learned chief justice of Massachusetts, in the case of *Isley v. Nichols*, 12 Pick. 270 [22

Am. Dec. 425] upon this question. As a general rule, no person can acquire a right to the custody of the person or the possession of the property of another by his own illegal act. And I think this would never have been considered an exception to that rule, had not the language of the case cited from the year books been misapprehended. In *Semayne's Case*, either the counsel, or one of the judges who delivered the opinion of the majority of the court, is represented as saying: "By Littleton and all his companions it is resolved, that the sheriff can not break the defendant's house by force of a *feri facias*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good." But that certainly could not have been intended as a translation of the language of the case in the year book, 18 Edw. IV. And Cowper has done great injustice to Lord Mansfield by quoting, as if it was his own language, a statement of that case which bears no resemblance to the note of the decision as it is in the year book. A very fair translation of the whole case is given by Mr. Metcalfe in his note to the case of *Semayne v. Gresham*, Yelv. 29, which translation does not vary materially from that of Mr. Justice Cowen, in the case of *The People v. Hubbard*, 24 Wend. 371 [35 Am. Dec. 628]. The substance of it is, that the sheriff had an execution against a party in a civil suit who had locked up his goods in a chest in his house; and the sheriff went and broke open the house and seized the goods and carried them off. The case being stated to the court for its decision, whether the sheriff was guilty of a tort, Littleton and his associate judges held that the party injured might have a writ of trespass against the sheriff for breaking his house, notwithstanding the execution; for, as they say, "the *fi. fa.* will not excuse him of the breaking of the house, but of the taking of goods only." Not that it would excuse the sheriff for having taken the goods in this particular case, after he had wrongfully broken into the house where they were. But the words *des biens*, which, literally translated, is "of the goods," seems to have led to the erroneous conclusion, that the court meant to decide that the taking of the goods in the particular case then stated to the court was a justifiable act, notwithstanding the breaking of the house to get access to them. In the French and Norman-French languages, the article is frequently used in cases where we dispense with it. And *des*, which appears to be a contraction of the preposition *de* and the article *les*, is used where we make use of the corresponding preposition only. Thus, the English expression, "the laws of

men," would, in French, be *les lois des hommes*; that is, literally, "the laws of the men."

Lord Mansfield, who seems to have taken it for granted, that in the case in the year books the court had decided that the taking of the goods was lawful, notwithstanding the illegality, intimates that he would not probably have so decided in a case of the first impression: *Lee v. Gansell*, Loft, 381; S. C., Cowp. 6. And it is certain no such question could have arisen in *Semayne's Case*, as no goods had been there taken by the sheriff; for it was an action against the owner of the house for shutting his doors and refusing to permit the sheriff to enter and seize the goods. The fact also that in the subsequent case of *Yates v. Delamayne*, Bac. Abr., tit. Execution (N), note, the court set aside the levy on an execution, because the sheriff had illegally entered the defendant's house to execute the writ, is conclusive to show that it was not then considered as settled law in England that the sheriff had a right to seize the defendant's goods after having obtained access to them by his own wrongful act. That case, too, appears to have been decided in 1776, only two years after the case of *Lee v. Gansell*, and while Lord Mansfield continued to preside in the court of king's bench.

For these reasons, I think the justices of the supreme court were clearly right in deciding that if the entry of the sheriff in the present case was illegal, the defendant, acting under the direction of the owner, had a right to expel him from the house and to prevent his carrying off the goods. I therefore can see no error in the judgment of the court below, and think that judgment should be affirmed.

The PRESIDENT delivered an oral opinion in favor of an affirmance, and Root, senator, in favor of a reversal of the judgment of the supreme court.

On the question being put, "Shall this judgment be reversed?" the members of the court voted as follows:

For reversal: Senators FAULKNER, NICHOLAS, PLATT, RHOADES, ROOT, and WORKS—6.

For affirmance: The PRESIDENT, the CHANCELLOR, and Senators BARTLIT, BOCKER, CLARK, DENNISTON, FRANKLIN, JOHNSON, PAIGE, RUGER, SCOTT, and VARNEY—12.

Judgment affirmed.

THE PRINCIPAL CASE IS CITED to the point that the law is very careful not to permit one man to acquire of another the possession of property by his own

illegal act, in *Chamberlain v. Choles*, 3 Abb. Pr. (N. S.) 121; and in *Chamberlain v. Choles*, 35 N. Y. 480, and in *Clark v. Miller*, 47 Barb. 45, to the point that a wrong reason for a correct decision does not entitle a party to a new trial.

GRAVES v. WOODBURY.

[4 HILL, 559.]

ONE JUDGMENT MAY BE SET OFF AGAINST ANOTHER, although the parties to the two records are not identical, and although one of the judgments has been assigned to a third person for a valuable consideration, and without notice of the existence of the other judgment, provided the right of set-off existed at the time of the assignment.

RIGHT TO SET OFF ONE JUDGMENT AGAINST ANOTHER DOES NOT ARISE until judgment is actually entered on both sides; and therefore there can be no set-off in a case where a claim which has been referred, is assigned before judgment is entered upon the report of the referee.

SET-OFF of judgments. In the first cause, the judgment was rendered in July, 1838, and in the second cause in November, 1842. The report of the referee in the latter cause was made in 1839, the demand having been immediately before assigned to J. O. Pettingal, for a valuable consideration. It appeared that the assignment to Pettingal was made after the referee had expressed his opinion, but before the signing of the report.

R. Haight, for the motion to set off.

S. J. Cowen, for the assignee.

By Court, COWEN, J. Jacob Graves being creditor in a judgment against Woodbury, and debtor in a judgment recovered by Woodbury, presents the usual case for a set-off; and it is no objection that the latter judgment is against Jacob Graves and another jointly: *Simson v. Hart*, 14 Johns. 63, 75, and the cases there cited. It is my duty, therefore, to direct a perpetual stay of Woodbury's execution on Graves entering satisfaction upon his judgment for so much as the judgment against him and Daniel Graves amounts to, unless Pettingal has acquired such a right to the latter judgment as entitles him to object. That he purchased and took an assignment of this judgment for a valuable consideration, even without notice, would form no objection, if the right of set-off existed at the time; for an assignee takes subject to all equitable as well as legal defenses which can be urged against the assignor: *Cooper v. Bigalow*, 1 Cow. 56, 206. The case of *Ramsey's Appeal*, 2 Watts, 228, 230 [27 Am. Dec. 801], is referred to as holding a different rule; but we must

follow the case cited from my reports, until we can be brought to see that it was an obvious departure from principle. So far from that, it accords with the general doctrine. There is no pretense here that Pettingal wanted notice of Jacob Graves' judgment when the assignment was executed; and if Graves' right of set-off had then attached, as against the assignor, the case is identical with that of *Cooper v. Bigalow*.

I am inclined to think, however, that under the peculiar circumstances of this case, no right of set-off in any form had attached at the time of the assignment. Clearly no legal right under the statute existed, for the debt due to Jacob Graves severally could not be allowed to compensate a debt due from him and another jointly: Mont. on Set-off, 23. His own demand alone was in judgment. Had Woodbury's been also in judgment when he assigned, a right to set-off would have arisen independently of the statute, on the doctrine peculiar to setting off judgments, under which the courts have not been exact in requiring the mutual debts to be due to and from the same number of persons. The right thus to depart from the general rule, however, never arises till judgment is actually entered on both sides. Here according to Jacob Graves' own affidavit, the demand against him and Daniel was assigned to Pettingal even before the referee had signed his report of the balance due. At that time, there could be no pretense of a right to move summarily for the set-off: *Ex parte Bagg*, 10 Wend. 615; *People v. Judges of Delaware C. P.*, 6 Cow. 598. Though the referee had expressed his opinion, neither of the parties nor even the referee himself was concluded. But it would have been the same thing if the report had been signed. It was still open to revision, if erroneous, on the motion of either party. It was but *prima facie* evidence of the debt, like the judgment in 6 Cowen, *ut supra*. In *Garrick v. Jones*, 2 Dowl. Pr. Cas. 157, the party moving had obtained a verdict, which he sought to set off against a judgment in favor of his adversary. The motion was denied on the sole ground that final judgment had not been obtained. See also *Johnson v. Lakeman*, Id. 646.

It follows that Pettingal purchased a demand against which no right of set-off existed at the time; and Graves has not shown that he suffered anything for want of immediate notice of the assignment, if there was such want of notice, which he does not aver. When Pettingal, some years after, perfected the judgment, the demand then for the first time came into a shape which would have subjected it to a set-off; but then, by motion only, even if

the right had still continued in Woodbury. Legally and formally it did continue in him; but he had parted with all his equitable right; nothing existed; nothing arose which could be objected against the Woodbury claim when he assigned it; and the judgment upon which the set-off is sought to be raised, was equitably in favor of the assignee. In an equitable sense there never was any judgment in favor of Woodbury; therefore nothing to which Graves could oppose his demand. The case is, I think, within the principle of *Hackett v. Connett*, 2 Edw. Ch. 73. There, the defendant had a demand against the complainant, which was incapable of being countervailed by a set-off, because such demand was unliquidated. Pending suit he assigned it to Alcock, who obtained judgment; whereupon the complainant filed his bill to compel a set-off of the judgment against previous decrees for costs in his favor on the dismissal of bills filed by Connett. Vice-Chancellor McCoun held that the assignee having taken the demand before any right to set off the decrees existed, had acquired a claim paramount to that of the assignor; and, on that ground, denied the relief prayed for. It is true, that notice of the assignment was, in that case, immediately, and before judgment obtained, given to the complainant. But the only object of such notice is, to put the debtor on his guard against dealing with the assignor, or perhaps obtaining other demands against him on the belief that he still continues the equitable owner. Could it be made apparent that Graves has suffered any injury for want of notice, the question would be different.

Pettingal seems to have fairly obtained an assignment as an indemnity against liabilities for Woodbury, amounting to something near if not quite the balance reported due from J. & D. Graves; and, under the circumstances, I think he is entitled to collect that balance by execution, notwithstanding the cross-judgment in favor of Jacob Graves.

Motion denied.

SET-OFF OF JUDGMENTS: See *Duncan v. Bloomstock*, 13 Am. Dec. 728, note 729, where the subject is discussed at length. The following cases cite the principal case to these points: *Porter v. Liscom*, 22 Cal. 433, that the assignee of a judgment, even for a valuable consideration without notice, takes it subject to the right of set-off existing at the date of the assignment; *Stillwell v. Carpenter*, 2 Abb. N. Cas. 259, that if a right of set-off existed before the assignment of a judgment, the right will hold good against the judgment either in the hands of the assignor or assignee; *Nash v. Hamilton*, 2 Abb. Pr. 37; *Roberts v. Carter*, 17 How. Pr. 347; *Perry v. Chester*, 53 N. Y. 243, and *Swift v. Prosty*, 64 Id. 546, that if the right to set-off did not exist at the time

of the assignment of a judgment, a subsequent entry of the judgment can not create it.

RIGHT OF SET-OFF DOES NOT ARISE until the judgment to be affected by it is entered: *Mackey v. Mackey*, 43 Barb. 60; *Spencer v. Barber*, 5 Hill, 569; *Peckham v. Barcalow*, Hill & Denio, 113; *Ferguson v. Bassett*, 4 How. Pr. 172; *Van Pelt v. Boyer*, 8 Id. 320; *Gay v. Gay*, 10 Paige, 376, all citing the principal case.

CARY v. GRUMAN.

[4 HILL, 625.]

MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF SOUNDNESS on the sale of a horse, is the difference between his value at the time of the sale, supposing him to be sound, and his value with the defect complained of; and a charge to the jury that the true measure of damages, in such a case, is the difference between the price paid, and the value with the defects, is erroneous.

ERROR from the Oneida common pleas. The action, which was originally commenced in a justice's court, was for the breach of a warranty of soundness on the sale of a horse. The justice rendered judgment in favor of the plaintiff, Gruman, from which Cary appealed to the common pleas. On the trial in the latter court, the judge directed the jury that the true measure of damages is the difference between the price paid and the value with the defects. The defendant below excepted to the charge, and judgment being for the plaintiff below, the defendant brought error to this court.

J. W. Jenkins, for the plaintiff in error.

O. S. Williams, for the defendant in error.

By Court, COWEN, J. It is unnecessary to inquire whether various exceptions taken in the case, mainly of a formal character, are well founded; for we think the court below erred in laying down the rule of damages. A warranty on the sale of a chattel is, in legal effect, a promise that the subject of sale corresponds with the warranty, in title, soundness, or other quality to which it relates; and is always so stated in the declaration when this is technically framed. It naturally follows that if the subject prove defective within the meaning of the warranty, the stipulation can be satisfied in no other way than by making it good. That can not be done except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed. There is no right in the vendee to return the article

and recover the price paid, unless there be fraud, or an express agreement for a return: *Voorhees v. Earl*, 2 Hill, 288. Nor does it add to or detract any from the force or compass of the stipulation that the vendee may have paid a greater or less price. The very highest or the very lowest and most trifling consideration is sufficient. A promise in consideration of one dollar, that a horse which, if sound, would be worth one hundred dollars, is so, will oblige the promisor to pay one hundred dollars if the horse shall prove totally worthless by reason of unsoundness, and fifty dollars if his real value be less by half, and so in proportion. Nor could the claim be enhanced by reason that the vendee had paid one thousand dollars.

The rule undoubtedly is, that the agreed price is strong evidence of the actual value; and this should never be departed from, unless it be clear that such value was more or less than the sum at which the parties fixed it. It is sometimes the value of the article as between them, rather than its general worth, that is primarily to be looked to—a value which very likely depended on considerations which they alone could appreciate. Things are, however, very often purchased on account of their cheapness. In the common language of vendors, they are offered at a great bargain, and when taken at that offer on a warranty, it would be contrary to the express intention of the parties, and perhaps defeat the warranty altogether, should the price be made the inflexible standard of value. A man sells a bin of wheat at fifty cents per bushel, warranted to be of good quality. It is worth one dollar if the warranty be true; but it turns out to be so foul that it is worth no more than seventy-five cents per bushel. The purchaser is as much entitled to his twenty-five cents per bushel in damages as he would have been by paying his dollar, and if he had given two dollars per bushel he could recover no more. So, a horse six years old is sold for fifty dollars with warranty of soundness. If sound, he would be worth one hundred dollars. He wants eyesight, and thus his real value is reduced one half. The vendee is entitled to fifty dollars as damages; and could recover no more had he paid two hundred dollars.

The tests of real value or the falling off in that value because the warranty proves to be false is one thing. The price agreed for the horse, said Lord Denman, C. J., in *Clare v. Maynard*, 7 Car. & P. 741, is, I think, “not conclusive as to its value, though I think it very strong evidence.” Again, “my view of it is, that the fair value of the horse, if sound, is the measure

of damages, and that the sum the plaintiff gave is only the evidence of value." The plaintiff gave forty-five pounds for the horse, and had sold him for fifty-five pounds with warranty, but was obliged to take him back. This *per se* was not allowed as a ground for recovering the ten pounds difference; the court saying it was the mere loss of an accidental bargain. But the value brought by the horse, on being sold as unsound at a common horse market, was received as evidence of the loss; and the difference between the price thus obtained, and the price paid, seems to have been taken as the measure of damages, there being no proof of the value of the horse as a sound one, independently of the price. Some items of special damage were claimed in the declaration over and above the difference of value, part of which were allowed and part disallowed. The only point decided, on the case coming before the whole court, was, that the accidental loss of a good bargain, on the resale, did not form a proper item of claim, it being demanded in the declaration as the loss of a bargain. It was there admitted, however, that the jury might otherwise have considered the price obtained on the resale as evidence of the real value. Lord Denman cited the case of *Cox v. Walker*, where a horse was sold to the plaintiff for one hundred pounds, with warranty of soundness, and the plaintiff was soon after offered one hundred and forty pounds for him. The horse proved unsound, and the plaintiff was obliged to sell him for forty-nine pounds and seven shillings. The chief justice left the offer of one hundred and forty pounds to the jury as evidence of the real value; and they found a verdict for the difference between one hundred and forty pounds and forty-nine pounds and seven shillings, viz., ninety pounds and thirteen shillings. This went on the express direction of Lord Denman, that the plaintiff was entitled to recover the actual value of the horse as a sound one at the time, after deducting what he brought as an unsound one. That direction was approved by him, after the case had been argued at the bar, and his attention had been again recalled to the point by the argument in *Clare v. Maynard*, 6 Ad. & El. 519.

In the *nisi prius* report of this case, *Curtis v. Hannay*, 3 Esp. 82, appears to have been mentioned by Lord Denman as bearing in favor of his rule. That action was for the price of a horse, at a time when the notion, now exploded, prevailed, viz., that the buyer might return the horse, and sue for the money paid. The defendant accordingly had offered to return him, but the plaintiff refused to receive him, because he had been improperly

treated. Lord Eldon thought the refusal proper under the circumstances; and, contrary to another rule now settled, he refused to allow a recoupment. But he said, "he took it to be clear law, that if a person purchase a horse which is warranted, and it afterwards turn out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse, and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty." *Bridge v. Wain*, 1 Stark. 504, was a warranty that certain pieces of scarlet cloth, taken by the plaintiff with a view to a sale in the Chinese market, were scarlet cuttings. Turning out not to be so, Lord Ellenborough charged the jury that the plaintiff was entitled to recover such a sum as he would have received had the warranty been true; and he directed the jury to allow the value of the goods in the Chinese market. The case was moved at the bar on the question, and a new trial refused.

The rule has certainly been laid down without express qualification, that the measure of damages is the difference between the real value of the horse and the price given: *Caswell v. Coare*, 1 Taunt. 566. This was right in the particular case. No evidence of actual value, independently of the price paid, was given or offered. *Voorhees v. Earl*, before cited, was a warranty that sixty barrels of flour were superfine. They proved to be of inferior quality; and, after looking at the cases, we thought they gave the measure of damages as it should stand on principle, viz., "the difference between the value of the sixty barrels, at the time of the sale, considered as superfine flour, and the value of the inferior article sold." See *Voorhees v. Earl*, 2 Hill, 291. In 2 Ph. Ev. 105, Am. ed. of 1839, the rule is laid down thus: "If he (the purchaser) keep the horse, he may recover the difference between the value of such horse perfectly sound, and the value of the identical horse at the time of the warranty." The author adds several cases of enhancement arising from special damage, and illustrating a class of exceptions which we admitted to exist in *Voorhees v. Earl*. Restricting the rule in *Caswell v. Coare*, to the case as it stood on the evidence—and so it should clearly be restricted—there is no discrepancy in the English cases.

It is impossible to say, nor have we the right to inquire, whether the real value of the horse in question, supposing him to have been sound, would have turned out to be more or less

than the ninety dollars paid. Suppose the jury thought, with one witness whom the court allowed to state such value for another purpose, that it was not more than eighty dollars; the plaintiff then recovered ten dollars, not on account of the defect, but because he had been deficient in care or sound judgment as a purchaser. On the other hand, had the horse been actually worth one hundred dollars, the defendant would have been relieved from the payment of the ten dollars because he had made a mistake of value against himself. The cause might thus have turned on a question entirely collateral to the truth of the warranty.

In confining the defendant to the rule of *Caswell v. Coare*, as an unqualified one, we think the court below erred; and that for this reason the judgment must be reversed. We direct that a *venire de novo* issue from that court; and that the costs shall abide the event.

Rule accordingly.

MEASURE OF DAMAGES IN ACTION FOR BREACH OF WARRANTY OF SOUNDNESS.—It is now well settled in England, and in nearly, if not quite, all the states in the union, that the true measure of damages, in an action for breach of warranty of soundness, is the difference between the value which the thing sold would have had, at the time of the sale, if it had been sound, or corresponding with the warranty, and its actual value with the defect. This rule is firmly established in New York, as will be seen by reference to the following cases, in all of which the principal case is cited with approval: *Hoe v. Sanborn*, 3 Abb. Pr. (N. S.) 195; S. C., 35 How. Pr. 203; *Comstock v. Hutchinson*, 10 Barb. 212; *Davis v. Talcott*, 14 Id. 622; *Sharon v. Mosher*, 17 Id. 520; *Richardson v. Wilkins*, 19 Id. 513; *Nickley v. Thomas*, 22 Id. 655; *Wells v. Cone*, 55 Id. 588; *Kiernan v. Rocheleau*, 6 Bosw. 153; *Joy v. Hopkins*, 5 Denio, 84; *Masterton v. Mayor etc. of Brooklyn*, 7 Hill, 68; *Fales v. McKeon*, 2 Hilt. 55; *Decker v. Myers*, 31 How. Pr. 375; *Zuller v. Rogers*, 7 Hun, 541; *Whitney v. Allaire*, 1 N. Y. 312; *Passinger v. Thorburn*, 34 Id. 640; *Hoe v. Sanborn*, 38 Id. 98. The following cases from other states maintain the same rule: *Freyman v. Knecht*, 78 Pa. St. 141; *Street v. Chapman*, 29 Ind. 142; *Booher v. Goldsborough*, 44 Id. 490; *Ferguson v. Hosier*, 58 Id. 438; *Howe Machine Co. v. Reber*, 66 Id. 496; *Reggio v. Braggiotti*, 7 Cosh. 166; *Truttle v. Brown*, 4 Gray, 457; *Morse v. Brackett*, 98 Mass. 205; *Foster v. Rodgers*, 27 Ala. 602; *Herring v. Staggs*, 62 Id. 180; *Birdsall v. Carter*, 11 Neb. 143; *Thoms v. Dingley*, 70 Me. 100; *Wright v. Roach*, 57 Id. 600; *Horn v. Buck*, 48 Md. 358; *McClure v. Williams*, 65 Ill. 390; *Wilson v. King*, 83 Id. 232; *Liles v. Baer*, 8 Iowa, 368; *Lacey v. Stranghan*, 11 Id. 258; *McCormick v. Vanatta*, 43 Id. 389; *Scranton v. Mechanics' Trading Co.*, 37 Conn. 130; *Field v. Kinneer*, 4 Kan. 476; *Smith v. Cozart*, 2 Head, 526; *Beresford v. McCune*, 1 Supr. Ct. Cincinnati, 50; *Woodward v. Thacher*, 21 Vt. 580; *Hook v. Stovall*, 26 Ga. 704; *Carr v. Moore*, 41 N. H. 131; *Aultman v. Hetherington*, 42 Wis. 622; *Wright v. Davenport*, 44 Tex. 164; *Slaughter v. McRae*, 3 La. Ann. 455; *Burton v. Young*, 5 Harring. 233; *Tatum v. Mohr*, 21 Ark. 349; *Stearns v. McCullough*, 18 Mo. 411. See also 1 Sedg. Meas. Dam. 291; *Connor v. Dempsey*, 49 N. Y. 665.

In England, it was formerly held that the measure of damages in such cases is the difference between the price paid and the actual value: *Caswell v. Coare*, 1 Taunt. 566. And this seems to have been the rule applied in *Courtney v. Boswell*, 65 Mo. 196, and in *Thornton v. Thompson*, 4 Gratt. 121, and *Boyles v. Overby*, 11 Id. 205. This latter rule was, however, repudiated in the subsequent case of *Clare v. Maynard*, 7 Car. & P. 741, in which the rule first above stated was laid down as the correct one. This rule was afterwards approved in *Loder v. Kekulé*, 3 C. B. (N. S.) 128, and in *Jones v. Just*, L. R., 3 Q. B. 197, and is now firmly established. The rule applied in *Courtney v. Boswell* does not appear to have been since questioned in Missouri, although it seems to us to be clearly in conflict with the rule in *Stearns v. McCullough*, 18 Mo. 411, cited above.

THE PRICE PAID IS STRONG EVIDENCE of the value of the property at the time of the sale: *Street v. Chapman*, 29 Ind. 142; *Carr v. Moore*, 41 N. H. 131; *Aultman v. Hetherington*, 42 Wis. 622; *Beach v. Raritan & Del. Bay R. Co.*, 37 N. Y. 470. And it seems that where there is no other evidence of the value, the contract price will be presumed to be the true value: *Seigworth v. Leffel*, 76 Pa. St. 476. Otherwise the contract price, or the price paid, is never considered to be conclusive evidence of the actual value. But where the vendee has resold the goods, the price obtained on the resale has been held to be evidence of the reduction in value: *Atkins v. Cobb*, 56 Ga. 86; *Clark v. Neufville*, 46 Id. 261.

CONSEQUENTIAL DAMAGES.—Where a vendee confiding in a warranty, has suffered indirect or consequential loss, the damages should make good the defects in the property sold, and also such additional loss as is the direct consequence of the seller's breach of his warranty: 1 Sedg. Meas. Dam. 292; *Ross v. Wallace*, 11 Ind. 112; *Wintz v. Morrison*, 17 Tex. 372; *Bradley v. Rea*, 14 Allen, 20; *Thoms v. Dingley*, 70 Me. 100; *Pinney v. Andrus*, 41 Vt. 631. In the case last cited, which was an action for false warranty of certain sheep, Wilson, J., in delivering the opinion of the court, said, at page 643: "The general rule, as to the grounds on which damages may be recovered for the breach of an express warranty, is not sufficiently definite for the guidance of the jury, but they should also be instructed as to what evidence tends to show the difference in value between the property *sound and unsound*, and what recoverable expenses have been seasonably, properly, and reasonably incurred, for doctoring and taking care of the sheep, in consequence of the unsoundness existing at the time of the sale." And again, at page 646, he said: "The vendor of property, sold with warranty against a specified defect, is liable for such damages as are the direct consequence of that defect; but he is not liable for any damage or injury to the property or vendee resulting from the neglect of the vendee to exercise ordinary care, diligence, and skill in the treatment of the defect warranted against."

It is not easy to draw the line between damages which are to be considered as direct consequences of a defect in an article sold with warranty of soundness, and those damages which are regarded as too remote or speculative to be recovered in an action on the warranty. A statement of the facts and of the decisions rendered thereon, in some of the cases, will tend to elucidate the principles applied by the courts. In *Thoms v. Dingley*, 70 Me. 100, the defendants, who were manufacturers and vendors of carriage springs, sold to the plaintiffs several sets of springs, to be used by them in the construction of carriages, warranting them to be of the best steel. Some of these springs proved to be defective, and the defendants were held liable to the plaintiffs for the necessary expense of taking out the defective springs and replacing

them by others. Such damages, though consequential, were held to be not uncertain, speculative, or remote. In *Horn v. Buck*, 48 Md. 358, which was an action on a warranty of a mare, the court decided that the plaintiff, having incurred expenses for the keep and doctoring of the mare, ought to be allowed for the same, but should be charged with whatever advantage he had received from her use. In *Tatum v. Mohr*, 21 Ark. 349, a case of warranty of soundness of a slave, it was decided that the plaintiff could recover the expenses necessarily incurred by him owing to the unsoundness of the slave. In *White v. Miller*, 71 N. Y. 118, the plaintiff sold cabbage seed which he warranted to be "large Bristol cabbage," but which turned out not to be such, but to be worthless, and the court held that the proper measure of damages was the difference in value between the crop raised from the defective seed and a crop of Bristol cabbage, such as would ordinarily have been produced that year. In the case of *Smith v. Green*, L. R., 1 C. P. Div. 92, the defendant sold a cow to the plaintiff, a farmer, with a warranty that she was free from foot and mouth disease. The plaintiff placed her with other cows, and some of them contracted the disease from her, and died. The court held that the defendant was liable in damages for the entire loss, if at the time of the sale he knew that the plaintiff was a farmer and might probably place the infected cow with others. The damages in that case were held to be the natural consequence of the breach.

THE PRINCIPAL CASE IS CITED to these points, in the following cases: That there must be fraud in a sale or a special agreement for the return of the property, to entitle the vendee to return it, and demand back the consideration, in *Royce v. Burt*, 42 Barb. 661; *Kiernan v. Rocheleau*, 6 Bosw. 153; *Muller v. Eno*, 14 N. Y. 601; that rent agreed is strong evidence of the real value of use and occupation, in *More v. Deyoe*, 22 Hun, 222; that a breach of warranty gives no right to rescind, unless there is an express contract to that effect, in *Gillespie v. Torrance*, 25 N. Y. 310.

ADSIT v. BRADY.

[4 HILL, 630.]

ONE WHO SUSTAINS INJURY BY MISFEASANCE OR NON-FEASANCE OF PUBLIC OFFICER, may obtain redress by an action adapted to the nature of the case.

SUPERINTENDENT OF REPAIRS ON CANALS IS BOUND TO MAKE REPAIRS, and remove obstructions to navigation, without waiting for orders from the commissioners, and if he fails to do so he is liable to persons who sustain injury by reason of his neglect. To justify his omission he must prove affirmatively that it resulted from obedience to orders, and it will not be presumed that the commissioners gave an illegal or unjustifiable command.

DECLARATION NEED NOT AVER THAT SUPERINTENDENT HAD PUBLIC MONEY in his hands for making repairs on canals, in an action against him for neglecting to make such repairs, by reason of which neglect the plaintiff sustained damage; nor is it necessary that such declaration should aver that the defendant's neglect was willful and malicious.

CASE against the defendant for neglecting his duty as superintendent of repairs on the Erie canal, by reason of which the

plaintiffs sustained injury. The declaration alleged that the defendant negligently permitted a sunken boat to remain in the canal from the nineteenth day of April, 1842, until the fifteenth day of May following; and that by reason thereof the plaintiffs' boat was sunk, and the goods thereon badly damaged. The defendant demurred to the declaration on the following, among other grounds: 1. That it did not allege that the defendant was directed by the commissioners, or either of them, to make repairs on his section, or to remove the sunken boat; 2. That it did not allege that the defendant had any moneys in his hands for the purpose of making repairs or removing obstructions; 3. That it did not allege that the loss of the plaintiffs was occasioned by the malicious or willful neglect of the defendant. The plaintiffs joined in the demurrer.

S. Stevens, for the defendant.

S. H. Hammond, for the plaintiffs.

By Court, BRONSON, J. When an individual sustains an injury by the misfeasance or non-feasance of a public officer, who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case. This principle is so well settled that it is only necessary to inquire whether there be anything in this case to take it out of the operation of the general rule.

Superintendents of repairs on the canals are appointed by the canal board, 1 R. S. 229, sec. 69, and give bond for the faithful execution of their trust: *Id.* 236, sec. 99. The statute further provides, that "it shall be the duty of each superintendent, under the direction of the canal commissioners, to keep in repair such sections of the canals and works connected therewith, as shall be committed to his charge; to make all necessary contracts for that purpose, and faithfully to expend all such moneys as shall be placed in his hands by the canal commissioners, or the commissioners of the canal fund:" *Id.*, sec. 100. The next section repeats, that the superintendent "shall be under the direction of the canal commissioners, and especially of the acting commissioner having charge of the line of the canal on which such superintendent is employed. This means no more than that the superintendent shall be under the general direction of the commissioners, and shall follow their instructions, if any are given, as to the extent and manner of making repairs and the mode of discharging his other duties. It does not mean that the superintendent, when he finds a break in the canal or a sunken boat

obstructing the navigation, shall wait a month for the next visit of the commissioner, or send a messenger for orders, before he stops the breach or removes the obstruction. The thing is preposterous: *Shepherd v. Lincoln*, 17 Wend. 250. The declaration states that the sunken boat obstructed and rendered the navigation of the canal unsafe and dangerous, and that the defendant knew it. That it was his duty to remove the obstruction can not be doubted.

It was said at the bar that an action will not lie against a deputy of the sheriff for non-feasance. But the defendant, although subject to the direction, is not a deputy of the commissioners; and before he can justify this apparent neglect of duty, he must show that the omission resulted from obedience to orders. It will not be presumed that the commissioners, or any other public officer, gave an illegal or unjustifiable command.

The want of an averment that the defendant had public money in his hands for the purpose of making repairs, was much relied on, and we are referred to cases to prove such an averment necessary. In *Bartlett v. Crozier*, 17 Johns. 439 [8 Am. Dec. 428], the action was against an overseer of highways, for not repairing a bridge, in consequence of which the plaintiff had sustained an injury. It was said by one member of the court, that means to make the repair should have been averred; but the case turned mainly on the ground, that the action, if it could be maintained against any one, should have been brought against the commissioners, instead of the overseer of highways. In *The People v. The Commissioners etc. of Hudson*, 7 Wend. 474, we refused to compel the commissioners, by mandamus, to rebuild a bridge which would cost seven hundred dollars, when they could not, by law, have funds to more than two hundred and fifty dollars, and when in fact they had none at all. In *The People v. Adsit*, 2 Hill, 619, we held, that the commissioners of highways were not answerable criminally for the non-repair of bridges, without an averment in the indictment that they had funds. It has not yet been decided that an individual pursuing a civil remedy must make such an averment; and as an original question, I should think it enough to show that the law imposed the duty of repairing, and then leave it to the officer to excuse himself, if he can, by showing the want of funds. But we need not settle that question. For the purpose of enabling superintendents of repairs to discharge their duties, they have been authorized by law to make contracts binding the state: 1 R. S. 236, sec. 99; and if the defendant had no public money, he

might have contracted for the removal of this obstruction. And besides, he either had, or might have had, funds in his hands. It is expressly provided, that the commissioners of the canal fund shall advance money in sums not exceeding five thousand dollars to each superintendent, for which an account is to be rendered as often as once in sixty days: *Id.* 194, sec. 6; *Id.* 236, secs. 100-103. And see Stat. 1837, p. 518, secs. 7, 8. The defendant either had funds, or he was in fault for not having them; and where that appears, it clearly can not be necessary for the plaintiff to make any averment on the subject. If some of these provisions had not been overlooked by the counsel, this objection would, I presume, have been abandoned.

It is said that the defendant had a discretion as to what repairs were needed, and consequently that his neglect should have been charged to be willful and malicious: *Tompkins v. Sands*, 8 Wend. 462 [24 Am. Dec. 46]. But clearly, the defendant had no discretion to leave this dangerous obstruction in the canal. On the facts stated in the declaration, it was his duty to remove the nuisance without any unnecessary delay.

Judgment for the plaintiffs.

PUBLIC OFFICER WHO NEGLECTS IMPERATIVE DUTY is liable for the injury caused by such neglect. The following cases cite the principal case on this point: *Hicks v. Dorn*, 9 Abb. Pr. (N. S.) 54; *People v. Tweed*, 13 Id. 80; *Hickok v. Trustees of Plattsburgh*, 15 Barb. 443; *Smith v. Wright*, 24 Id. 172; *S. C.*, 12 How. Pr. 557; *Fish v. Dodge*, 38 Id. 173; *Mott v. Hudson R. R. Co.*, 8 Bosw. 353; *Exchange F. Ins. Co. v. Del. & Hud. Canal Co.*, 10 Id. 187; *Pauiding v. Cooper*, 10 Hun, 22; *Bassett v. Fish*, 12 Id. 210; *Connors v. Adams*, 13 Id. 430; *Goetchens v. Matthewson*, 5 Lans. 221; *Conroy v. Gale*, Id. 348; *Hatson v. Mayor etc. of N. Y.*, 9 N. Y. 169; *Robinson v. Chamberlain*, 34 Id. 390; *Hicks v. Dorn*, 42 Id. 53; *Hover v. Barkhoof*, 44 Id. 116; *McCarthy v. Syracuse*, 46 Id. 196; *Olmsted v. Dennis*, 77 Id. 382; *Vandyke v. Cincinnati*, 1 Disn. 536. In *Garlinghouse v. Jacobs*, 29 N. Y. 312, Wright, J., in delivering his opinion, said: "In the case of *Adsit v. Brady*, 4 Hill, 630, Judge Bronson lays down the broad proposition, that 'when an individual sustains an injury by the misfeasance or non-feasance of a public officer, who acts or omits to act contrary to duty, the law gives redress to the injured party by an action adapted to the nature of the case;' but there is no reported English or American authority that justifies so broad a rule of liability of a public officer. There is no case where the duty of the officer was one done to the public at large, and not to any individual, either specially or for fee or reward paid by him, that the officer has been made accountable in a private action for a mere neglect of duty; and the fact that no such action has been brought or sustained, either in England or this state, for a century and a half, except the single case of *Adsit v. Brady*, affords a strong presumption that no such action will lie." But in the subsequent case of *Robinson v. Chamberlain*, 34 N. Y. 391, Peckham, J., who delivered the opinion of the court, said in reference to the rule laid down in the principal case: "This is a healthful rule, sound entirely in public policy, if as a rule of law

it can be questioned. As a rule of law, as there applied, it has stood for nearly a quarter of a century, and, I think, should continue." This latter view has been approved in subsequent cases, and is, no doubt, the law in New York. See *Hover v. Barkhoof*, 44 Id. 117.

WANT OF MEANS TO REPAIR should be shown as a defense: *Himes v. Lockport*, 50 N. Y. 339; *Weed v. Ballston Spa*, 76 Id. 336, both citing the principal case.

THE PRINCIPAL CASE IS CITED to these points in the following cases: That it was the duty of the superintendent of repairs of the Erie canal to remove obstructions from it: *Hicks v. Dorn*, 54 Barb. 176; S. C., 1 Lans. 85; that want of funds is no defense to an action for misfeasance of commissioners of highways, in not properly constructing a bridge: *Rector v. Pierce*, 3 Thomp. & C. 418; that general allegation of neglect and breach of duty is sufficient in an action against a public officer for neglect of duty: *Hyatt v. Trustees of Rondout*, 44 Barb. 391; that commissioners of highways are not bound to build or repair roads or bridges, until the means are provided: *Barker v. Loomis*, 6 Hill, 465; that it was not necessary to aver that the defendant had funds in his hands to make the repairs: *Griffith v. Follett*, 20 Barb. 629; that if a public officer has, or might have had in his hands, funds to pay a claim against a city, he is bound to pay it: *People v. Stout*, 23 Id. 348; that injury to plaintiff must be proximate upon the neglect of the defendant, to enable him to recover: *Day v. Crossman*, 4 Thomp. & C. 125.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

NELSON v. BOSTWICK.

[5 HILL, 37.]

DEMAND MUST BE ALLEGED AND PROVED IN ACTION AGAINST SURETY on a bond filed by a plaintiff on commencing an action, conditioned that such plaintiff will pay "on demand" all costs awarded to the defendant, because the demand is parcel of the contract, though no demand need be averred in suing a party on his agreement to pay his own debt on demand.

BREACHES MUST BE ASSIGNED IN DECLARATION ON BOND other than for the payment of money at a particular time or in specified installments, under 2 N. Y. R. S. 378, sec. 5. Hence such an assignment is necessary in an action against a surety on a bond filed by the plaintiff in an action, conditioned for the payment by such plaintiff, on demand, of all costs awarded to the defendant, and the omission of such assignment is fatal even after verdict and nominal damages can not be allowed.

JUDGMENT AGAINST ONE OF TWO JOINT OBLIGORS in an action against both, though only one is served, is erroneous in substance, and the defect can not be overlooked on writ of error.

DEBT in New York city superior court on a bond made by Shumway and Nelson, defendants, to the plaintiffs. Nelson alone was served. The declaration did not set out the condition of the bond nor assign any breach. The defendant craved oyer, and set out the condition, from which it appeared that the bond was given in a former action brought by Shumway, a non-resident, against the present plaintiffs, conditioned to be void if Shumway should pay on demand all costs that might be awarded to the defendants, now plaintiffs. Pleas: 1. *Non est factum*. 2. That no demand of the costs was made on Shumway. Repli-

cation, averring a demand. It was proved that Shumway failed in his action, and that costs, in a certain sum, had been awarded against him, and an execution therefor returned unsatisfied. A motion for a nonsuit on the ground that no demand had been proved, and that no breach was assigned, was overruled. An objection that only nominal damages could be assessed was also overruled. Verdict and judgment for the plaintiffs for the amount claimed, and the defendant Nelson brought error, on exceptions to the above rulings.

A. Tuber, for the plaintiff in error.

S. Stevens, for the defendants in error.

BRANSON, J. When a party agrees to pay his own debt on request, it is regarded as an undertaking to pay generally, and no special request need be alleged. But it is otherwise when he undertakes for a collateral matter, or as a surety for a third person. There, if the agreement be that he will pay on request, the request is parcel of the contract, and must be specially alleged and proved: *Devenly v. Welbore*, Cro. Eliz. 85; *Hill v. Wade*, Cro. Jac. 523; *Waters v. Bridge*, Id. 639; *Birks v. Trippet*, 1 Saund. 32, and note (2); *Harwood v. Turberville*, 6 Mod. 200; Com. Dig., Pleader, c. 69; *Sicklemore v. Thistleton*, 6 Mau. & Sel. 9; *Carter v. Ring*, 3 Camp. 459; *Douglass v. Reynolds*, 7 Pet. 113; 2 Saund. 108, note (3); Lawes' Pl. 232, 251; 1 Chit. Pl. 363, ed. of 1837. Here there was no precedent debt or duty upon Nelson. He was a surety, and in becoming so he had a right to make his own terms. The condition of the bond is, that Shumway, the principal debtor, shall pay on demand. The demand is parcel of the contract, and is in the nature of a condition precedent to a right of action on the bond. As no demand of the costs from Shumway was proved, there was no breach of the condition, and no right of action had accrued on the bond. Although no breach was assigned in the declaration, the plaintiffs have gone on and assessed damages to the full amount of the costs recovered against Shumway. This was clearly irregular. The plaintiffs were not entitled to an assessment of even nominal damages: *Barnard v. Darling*, 11 Wend. 28. These errors are presented by the bill of exceptions. There are others which appear in the judgment record.

Breaches should have been assigned in the declaration. The statute 8 and 9 Wm. III., c. 11, provided that the plaintiff might assign breaches, and only extended, in terms, to bonds for the performance of covenants. And yet upon the construc-

tion of that statute, it has been settled that the plaintiff must assign breaches, and that he must do so in all cases, except upon bail bond, where the condition is not for the payment of a gross sum of money by the obligor at a specified time. He must even do so where the condition is for the payment of an annuity: *Roberts v. Mariett*, 2 Saund. 187, note (2); *Walcot v. Goulding*, 8 T. R. 126. But with us, breaches need not be assigned where the condition is that the obligor will pay a certain sum of money in specified installments: *Spaulding v. Millard*, 17 Wend. 331. Under the English decisions this was clearly a case for assigning breaches, and our statute is much broader in its term than theirs. The words are, the plaintiff shall assign breaches when the action is upon a bond "for the breach of any condition other than for the payment of money:" 2 R. S. 378, sec. 5. It extends to every kind of condition, excepting one that the obligor will pay a certain sum of money at a particular time, or in specified installments. This bond was within the statute for several reasons: 1. The condition was not that the obligors should pay money, but that Shumway should pay it. 2. It was not to pay at a specified time, but upon the happening of a contingent event. Shumway was to pay such costs as might be awarded against him in the suit where he was plaintiff. It was uncertain, when the bond was given, whether any costs would ever be awarded to the defendants in that action. 3. The condition was not that Shumway should pay at all events, but that he should pay on demand. And 4. The condition was not for the payment of a specified sum of money, but for the payment of an uncertain sum, to wit, all costs that might be awarded to the defendants in that action. To make out a forfeiture and a right to sue on the bond, it was necessary to aver, by way of assigning a breach of the condition, that costs had been awarded to the defendants in the action mentioned in the bond, specifying the amount; and that those costs had been demanded of Shumway, and remained unpaid.

Where the condition is, that the obligor will pay a certain sum of money at a particular time, and where, assuming that the defendant has done nothing, we can, with the almanac in our hands, see that there must have been a forfeiture of the bond, there the plaintiff need not assign breaches. If the money was paid, or the defendant has a release, or any other matter in discharge of the action, he may plead it. But where the forfeiture of the bond depends on the happening of some

event other than the lapse of time, so that on reading the condition we can not see that a right of action has accrued, there the plaintiff must show by way of breach, the existence of the facts on which the right of action depends. And so, too, the plaintiff must assign breaches where the damages are not liquidated, and can not be ascertained by mere calculation, without looking beyond the bond, and inquiring into extraneous facts. This case is clearly within the statute, and it is a fatal objection that breaches were not assigned in the declaration: *Reed v. Drake*, 7 Wend. 345.

There is another error appearing upon the face of the record. The action was brought against two joint obligors, and yet the judgment is against Nelson only. Although Shumway was not served with process, the judgment should have been against both in the same manner as though both had been brought into court: 2 R. S. 377, sec. 1. This is not a mere formal defect which may be overlooked on a writ of error. It is matter of substance. It changes the form of the execution, and may prejudice Nelson in the collection of the money: Secs. 3, 4. Until the record is amended no execution can issue against Shumway.

This is not a case for awarding a *venire de novo*. There is a fatal error which lies back of the trial. The declaration is bad for not assigning a breach. The proper course will be to reverse the judgment, and leave the plaintiffs to commence a new action if they shall be so advised.

NELSON, C. J., concurred.

COWEN, J., delivered an opinion concurring with Bronson, J., on the point that the judgment should be reversed for the failure to prove a demand, but holding that this case was not within the statute requiring an assignment of breaches. He also thought that the entry of judgment against Nelson only, was a mere formal defect, and could be amended. He thought a *venire de novo* should be awarded.

NECESSITY OF DEMAND BEFORE ACTION: See *Mitchell v. Gregory*, 4 Am Dec. 655; *Mitchell v. Merrill*, 18 Id. 123; *State v. Neil*, 23 Id. 623. Where a bond is conditioned to account "when thereto requested," the request is parcel of the condition, and must be alleged and the time and place specified, in an action for a breach: *Jones v. Cooper*, 16 Am. Dec. 678. As to the necessity of a previous demand in an action against an agent for moneys received for his principal, see *Lillie v. Hoyt*, *post*, and note. Where a party undertakes collaterally or as surety for the performance of an act by another on demand, as in the case of a surety in a bond for the payment of certain

costs by the principal on demand, the demand is parcel of the contract, and must be averred and proved in an action against the party so undertaking: *Douglass v. Rathbone*, 5 Hill, 144; *Smith v. Norval*, 2 Code R. 14; *Kettle v. Lipe*, 6 Barb. 469. But where one undertakes, as principal debtor, to pay his own debt on demand, no demand need be averred or proved, the commencement of the action being a sufficient demand: *State Bank of Ohio v. Fox*, 3 Blatchf. 433; *Locklin v. Moore*, 57 N. Y. 362. Thus, in case of a mortgage to secure a debt payable on demand, it is not necessary in a suit for the foreclosure of such mortgage to aver or prove a demand: *Gillett v. Balcom*, 6 Barb. 373. And even in the case of a surety, if his undertaking is absolute for the payment of the debt if the principal should make default, allegation and proof of demand on the principal are unnecessary: *McKenzie v. Farrell*, 4 Bosw. 193. In all these cases *Nelson v. Bostwick* is cited and approved as authority. In *Greenup v. Stoker*, 3 Gilm. 212, the case is cited to the point that in case of mutual or dependent covenants, neither party can sue without an offer to perform on his own part and averment and proof thereof, or a waiver by the defendant.

ASSIGNING BREACHES IN ACTION ON BOND: See *Conover v. Commonwealth*, 12 Am. Dec. 451; *State v. Roberts*, 21 Id. 62; *Governor v. White*, 24 Id. 763; *Tinney v. Ashley*, 26 Id. 620. As to the assignment of breaches in debt on a bond payable in installments, and as to the form of the judgment and mode of proceeding, the principal case is cited in *Syracuse City Bank v. Coville*, 19 How. Pr. 387.

JUDGMENT IN ACTION AGAINST JOINT DEBTORS, WHERE ONLY ONE IS SERVED, must be in form against all: *Oakley v. Aspinwall*, 1 Duer, 18; *Corning v. Shepard*, 3 How. Pr. 19; *Bacon v. Comstock*, 11 Id. 200, citing the principal case. In *National Bank v. Spencer*, 19 Hun, 573, it is said, however, that the opinions of Bronson and Cowen, JJ., on this point in *Nelson v. Bostwick* were contradictory, and that the point was not decided.

In *Beers v. Shannon*, 73 N. Y. 302, the case is cited generally as to actions against sureties on bonds other than for the payment of money, and as to judgments thereon.

VAN EPPS v. HARRISON.

[5 HILL, 63.]

VENDOR'S FRAUD IN CONTRACT OF SALE IS NO BAR TO ACTION FOR PRICE, where the contract has been fully executed by delivery or conveyance, and the property is not shown to be absolutely worthless, and has not been returned or reconveyed on discovering the fraud. Principle applied to an executed sale of land.

DAMAGES MAY BE RECOUPED IN ACTION ON SEALED INSTRUMENT, as well as on an unsealed one, by showing a partial failure of consideration, under 2 N. Y. R. S. 406, sec. 77; but notice of the defense is necessary, and it can not be pleaded where it does not go to the whole consideration.

VENDEE MAY RECOUP DAMAGES FOR FRAUDULENT MISREPRESENTATIONS by the vendor as to the condition of the land sold and its adaptability for the use for which the vendor knew that the vendee wanted it, in an action for the price, where the vendee trusted to the representations in making the purchase.

MEASURE OF DAMAGES FOR VENDOR'S FRAUDULENT MISREPRESENTATIONS as to the condition and situation of the land sold, is the difference between the contract price and the actual value at the time of sale.

VENDOR'S FRAUDULENT MISREPRESENTATIONS AS TO THE PRICE paid by him for the land sold, are admissible in evidence by way of recoupment in an action against his vendee for the purchase money. **BRONSON, J., contra.**

DEBT on bond. Plea *non est factum*, with notice of special matter. Under this plea the defendant offered evidence in bar of the action, to the effect that the bond sued on was given for part of the purchase money of certain land purchased by the defendant of the plaintiff at Greenbush, opposite Albany, which had since been conveyed to the defendant, and that the defendant was induced to make the purchase by certain false and fraudulent representations by the plaintiff as to the condition and situation of the land, and as to the price which the plaintiff had paid for it. The evidence was rejected, and the defendant excepted. The same evidence as to the representations as to price was offered by way of defense to the action, and was again rejected, and the defendant again excepted. The evidence as to the plaintiff's misrepresentations as to the condition of the land was again offered, first, by way of defense, and, second, to diminish the recovery, and was again rejected, and the defendant excepted. This constituted the third and fourth exceptions. The substance of the representations offered in evidence is stated in the opinion. Verdict for the plaintiff for the amount claimed. Motion for a new trial.

D. Wright and D. Cady, for the defendant.

G. Gould, for the plaintiff.

By Court, **BRONSON, J.** In contracts of sale which have been fully executed on the part of the vendor, by the delivery or conveyance of the thing sold, no fraud on his part in making the contract can operate as a complete bar to an action for the price, unless the thing sold was absolutely worthless, or the vendee has returned or reconveyed the property on the discovery of the fraud. When sued for the price, the vendee may, in general, recoup damages; but while he retains the property he can not treat the contract as wholly void, and refuse to pay anything. By retaining the property he affirms the validity of the contract, and can be entitled to nothing more than the damages which he has sustained by reason of the fraud. In this case the contract was completely executed on the part of the plaintiff, by the conveyance of the land. The defendant has got that still, and

when he offered to prove fraud as a bar to the action, instead of offering it in abatement of damages, he asked too much, and the evidence was properly rejected for that reason.

The next question is, whether this defense can be set up in an action upon a sealed instrument, where the evidence does not go to the whole consideration. The statute provides, that the seal "shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed:" 2 R. S. 406, sec. 77. The language is broad enough to include the case of a partial as well as a total want or failure of consideration; and I see no good reason why the defendant should not be allowed to recoup damages in an action upon a sealed as well as upon an unsealed instrument. If the point has not been directly adjudged, it has often been assumed, that the statute had placed both classes of contracts upon the same footing, and that in the one case as well as in the other, the defendant might attack the consideration either in whole or in part: *Case v. Boughton*, 11 Wend. 106; *Johnson v. Miln*, 14 Id. 195; *Tallmadge v. Wallis*, 25 Id. 107. It is true that the statute speaks of pleading, as well as giving notice of this defense: sec. 78; and it can not be pleaded where it does not go to the whole consideration: *Per Walworth, Ch.*, in *Tallmadge v. Wallis*. But the words of the statute will be satisfied by allowing the defendant to plead the defense where it amounts to a complete bar, and requiring him to give notice where it only goes in defalcation of damages. The defendant's evidence was finally offered by way of recoupment; and that brings us to the question, whether there was any such fraud as would give the defendant an action. If there was, the defendant may have the proper allowance in this suit, instead of being put to his cross-action.

According to the third and fourth offers of evidence, the land was purchased for the purpose of being laid out and sold for building lots, and the plaintiff knew it. He also knew, and the defendant did not know, the condition and situation of the land; and the plaintiff falsely and fraudulently represented that the land was even and level, well situated for building lots, and required no grading; all of which was false. It will seem marvelous, if not wholly incredible, to those who did not live in the years 1835-36, that men should purchase lands lying within ten hours' ride of their residence and agree to pay thirty-two thousand dollars, without ever having taken the trouble to look at the property either in person or by an agent. But farms

lying in the vicinity of cities and villages were then so much in demand for the building of new towns, that many persons thought it best not to hazard the loss of a bargain by stopping to look or inquire, when they could purchase at a thousand dollars per acre. They might better lose the little sum of thirty-two thousand dollars than be absent one whole day from Wall street, and thus miss the possible chance of purchasing the site of some other prospective city of much greater magnitude. Wonderful as it may seem to the next generation, such things did happen; and in this case the defendant offered to prove that he knew nothing about the land, except that it lay on the opposite side of the river from the city of Albany. He trusted to the representations of the plaintiff in relation to the condition of the property, and the only question is, whether the defendant must charge the loss upon his own folly and the madness of the times, or whether the plaintiff has done such a wrong as may be redressed by action. The credulity of the defendant furnishes but a poor excuse for the falsehood and fraud of the plaintiff, and the latter will have no just ground for complaint if he is held responsible for his misconduct. I am not entirely without apprehension that some bad consequences may result from giving an action against the vendor for misrepresentations concerning the quality or condition of the land he sells. Common prudence requires that the vendee should ascertain the truth of such assertions before he acts. But I am unable to distinguish this case from *Sanford v. Handy*, 23 Wend. 260. There, the alleged misrepresentation related to the location of the land. Here, the false representation related to the condition of the property, or the practicability of using it for building purposes with little or no expense. We think the evidence should have been received.

If the jury shall find the fraud, the question is then asked, how shall the amount of the defendant's damages be ascertained? As the land, whether the representations were true or false, was in reality worth only a small part of the price which the defendant agreed to pay, there may be some difficulty in answering the question. But it may, I think, be solved. We must not go back to the date of the contract for the price, and then come down to the present day for the actual value of the land, and charge the plaintiff with the difference. The defendant must bear the consequences of the prevailing delusion about prices and new towns under which the purchase was made. On the other hand, the plaintiff can not say that his fraud has worked no

injury because everybody has now found out that the land never was worth anything for the purpose of building a town upon it: See *Smith v. Griffith*, 3 Hill, 333 [38 Am. Dec. 639]. The cause must, as far as practicable, be tried just as it would have been tried the day after the contract was made, if the question had arisen at that time. The jury must assume, what the parties then believed, that the land was valuable as the site for a town, and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes had the plaintiff's representation concerning the surface been true. One mode of arriving at the correct result, and perhaps the only one, would be to inquire into the probable expense of reducing and conforming the surface of the ground to a condition corresponding with the plaintiff's representation. This would, I think, give the correct rule of damages; but in the present stage of the cause it is not necessary to settle the question.

There was a further offer to show that the defendant represented he had just paid thirty-two thousand dollars for the land, when in truth he had only paid one half that sum. An intimation was thrown out by the chief justice in *Sandford v. Handy*, 23 Wend. 260, that a misrepresentation as to the actual cost of property might be a material fact; but the point was not decided. It is not every false affirmation of the vendor which will give the vendee an action, although he may be deceived by it. It often happens in the making of bargains that many things are said which neither party regards of much consequence; and if the buyer trusts to representations which were not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily within his reach, it is better that he should suffer the consequences of his own folly, than to give him an action against the seller: See 2 Stark. Ev. 471, ed. of 1826; *Browning v. Stevens*, 2 Car. & P. 337; Sug. V. & P. 2, 3. No action will lie for a false representation by the vendor concerning the value of the thing sold; it being deemed the folly of the purchaser to credit the assertion. And besides, value is matter of judgment and estimation, about which men may differ. Nor will an action lie for a false affirmation that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase, and was deceived as to the value. And so of other cases where the purchaser might by the exercise of common prudence have ascertained the truth and saved himself from injury: *Harvey v. Young*, Yelv. 21;

and note by Metcalf; *Davis v. Meeker*, 5 Johns. 354; *Bayly v. Merrel*, Cro. Jac. 386; *Fenton v. Browne*, 14 Ves. 145; Sug. V. & P. 2, 3; *Kinaird v. Lord Dean*, Id. 4, note. In such cases the false affirmation is not enough. The vendee must go further and show that some deceit was practiced for the purpose of putting him off his guard: *Dawes v. King*, 1 Stark. 75. In *Elkins v. Tresham*, 1 Lev. 102, it was held that an action would lie for falsely affirming that the property was let at forty-two pounds per annum, when the rent was less than that sum, by which the plaintiff was deceived and induced to pay a high price for the property. It was admitted, however, that no action would lie for a false affirmation concerning value; but a distinction was taken as to the rent, and the court said: "Perhaps the lease is by parol, or the tenant will not inform the purchaser what rent he gave." This decision was followed in *Lysney v. Selby*, 2 Ld. Raym. 1118; S. C., 1 Salk. 211, by the name of *Risney v. Selby*. But Lord Holt said of *Elkins v. Tresham*, that "if it were not for that resolution, I should think it a hard action to maintain." And Gould, J., said: "The value of the rents was a hard thing to be known, and secret, known to none but the landlord and the tenants, and they might be in confederacy together." And it was not until "after long considering" that the court finally agreed that the action could be maintained. Those cases have since been followed: *Dobell v. Stevens*, 3 Barn. & Cress. 623; *Browning v. Stevens*, 2 Car. & P. 337. If an affirmation concerning the cost of the property was of any consequence, I think the defendant should have taken the trouble to inquire and satisfy himself. But I can not think it a matter of any legal importance. It was only another mode of asserting that the property was of the value of thirty-two thousand dollars; and all the books agree that no action will lie if such an affirmation prove false. It is the folly of the purchaser to trust to it. Indeed, the representation here amounts to less than a direct affirmation of value, for it only asserts that the plaintiff and another man agreed that such was the value. It would lead to great mischief to allow men to annul contracts upon such a ground. If the defendant could make out that the plaintiff was his agent in purchasing from Van Rensselaer, then what the plaintiff said about the price he paid might be material; but not in any other point of view.

Such are my views upon this branch of the case; but my brethren are of opinion that the false affirmation concerning the price paid for the land furnishes a good ground of action.

There must, therefore, be a new trial upon this point, as well as the one relating to the condition of the land.

New trial granted.

RECOUPMENT IN CASE OF BREACH OF CONTRACT.—The doctrine that where one seeks to recover upon a contract, some of the stipulations of which he has himself broken, his claim should be abated to the extent of the injury inflicted upon his adversary by the breaches upon his own part, by permitting a recoupment of damages, is one of obvious equity. Indeed it is essentially an equity doctrine, and was probably imported into the common law courts from the civil law by way of the court of chancery: *Wheat v. Dotson*, 12 Ark. 699. It is true that the term "recoupment" is a very ancient one in the law: 2 Sedg. Meas. Dam., 7th ed., 270. Instances of the early application of the doctrine to cases other than those of breach of contract are found in the old books; as where upon a recovery in an assize against a disseisor the latter was permitted to recoup against the plaintiff's damages for the value of grain sown or repairs made on the land, or for rent due, or for payment of rent issuing out of the estate: 8 Vin. Abr. 556, tit. Discount; Dyer, 2, 6; Waterman on Set-off, sec. 459, and note. But the doctrine seems to have fallen into disuse for a time in the law courts: 2 Sedg. Meas. Dam., 7th ed., 270, being "stified by artificial technical rules, and driven for refuge into the equity courts:" *Wheat v. Dotson*, 12 Ark. 699. In its modern application to cases of breach of contract the doctrine may be said to have been unknown at common law: *Price v. Reynolds*, 39 N. J. L. 171, per Beasley, C. J. Indeed it is yet in its infancy as a legal doctrine: 7 Am. L. Rev. 389. In some of the states, as in Virginia and West Virginia, it is still entirely unsettled: *Baltimore etc. R. R. Co. v. Jameson*, 13 W. Va. 833; S. C., 31 Am. Rep. 775. It is, however, firmly established in most of the states, and in England: *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333. But the extent to which it is applied varies considerably in different jurisdictions: *Ward v. Fellers*, 3 Mich. 281, per Martin, J.

ORIGINALLY CONFINED TO CASES OF FRAUD.—It is said that the remedy of recoupment of damages was first allowed in England, in cases of contract, only where some fraud was imputable to the plaintiff which yet did not "equitably go to the entire prevention of a recovery:" Waterman on Set-off, secs. 461, 470. Inasmuch as courts of law and of equity have concurrent jurisdiction in cases of fraud, it is not surprising that equitable doctrines relating to the subject should be early found making their way into the legal tribunals, and gradually mitigating and relaxing the strictness of the technical rules of the common law. Nor is it surprising that a principle of adjustment of damages, so just and reasonable in itself, having once found a foothold in courts of law, should ultimately be extended not only to cases of fraud, but to other cases of mutual default between the parties to a contract. And such we find to be the history of the matter. It is now, and has long been well settled, that the remedy of recoupment is not confined to cases in which fraud is imputable to the plaintiff, but exists also where the defendant claims damages merely from a breach of some of the stipulations of the contract on the plaintiff's part: *Batterman v. Pierce*, 3 Hill, 171; *Myers v. Estell*, 47 Miss. 4; Waterman on Set-off, sec. 470. Traces of its original limitation to cases of fraud are found, however, in some of the earlier decisions in the United States. Thus it is said in *Peden v. Moore*, 21 Am. Dec. 649, that defect of consideration, where fraud enters into the transaction, may be given in evidence in diminution of damages. The learned judge who delivered the

opinion in that case, however, very clearly shows that there is no foundation in principle for the limitation of the doctrine to transactions involving fraud.

APPLICATION TO ACTIONS ON QUANTUM MERUIT OR QUANTUM VALEBAT.—The earliest instances of the application of the doctrine of recoupment to cases of mere breach of contract, without any admixture of fraud, were where the plaintiff sought to recover on a *quantum meruit* for work and labor. In such cases the defendant was permitted to show, by way of reducing the plaintiff's claim to a recovery, that the work was improperly or unskillfully done: *Basten v. Butler*, 7 East, 479; *Duffit v. James*, Id. 490; *Furnsworth v. Garrard*, 1 Camp. 38. The propriety of the application of the equitable principle of recoupment to such a case is obvious, for by the very form of his action the plaintiff puts his right to a recovery upon equitable grounds. He challenges investigation of the substantial merit and justice of his claim. He does not stand upon any mere technical legal right, but asks simply for what his work is worth. The defendant is thus invited to show any facts, by reason of which the value of the work is less than the plaintiff claims. In the case of *Furnsworth v. Garrard*, Lord Ellenborough thus stated the grounds of the allowance of recoupment or reduction of damages in such a case: "This action is founded on a claim for meritorious service. The plaintiff is to recover what he deserves. It is therefore to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services, he deserves nothing." Further on in his opinion his lordship says: "I now consider this as the correct rule, that if there has been no beneficial service there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the extent of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit." In accordance with the doctrine laid down in this decision, and the others above referred to, it has long been established that wherever the plaintiff sues on a *quantum meruit* or *quantum valebat*, for service rendered or goods sold and delivered, the defendant may recoup his damages, by showing that the work was unskillfully or negligently performed, or that it was done under a contract which has been broken, or that the goods were purchased under a special contract which has not been fully performed by the plaintiff by reason of non-delivery of part of the goods, breach of warranty, or the like: *Epperly v. Bailey*, 3 Ind. 72; *Duncan v. Baker*, 21 Kans. 99; *Elliot v. Heath*, 14 N. H. 131; *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333; *Noble v. James*, 2 Grant (Pa.), 278; *Porter v. Woods*, 3 Humph. 56. Other cases to the same effect will be hereafter referred to under other heads in this note. In the older English decisions on this subject, there was a disposition to limit the doctrine of recoupment in cases of contract to the abatement of the plaintiff's recovery on a *quantum meruit* or a *quantum valebat*: *Dodge v. Tileston*, 12 Pick. 328. In North Carolina it is held to be so limited, and not to be allowable where the plaintiff sues on a special contract of sale or for services, in *Hobbs v. Riddick*, 5 Jones' L. 80, and *McDugald v. McFadgin*, 6 Id. 89. No such limitation exists in the other states: *Dodge v. Tileston*, 12 Pick. 328.

ALLOWANCE OF, IN ACTION ON SPECIAL CONTRACT.—The general rule, particularly in the United States, now is, that the defense of recoupment is just as admissible in an action upon a special contract as upon a *quantum meruit* or *quantum valebat*; and that if the defendant can show that the plaintiff has himself violated the contract upon which he sues, to the defendant's injury, the recovery may be abated to the extent of such injury, or destroyed altogether if the defendant's damages equal or exceed the plaintiff's claim: *Over-*

ton v. Phelan, 2 Head, 445; *Wheat v. Dotson*, 12 Ark. 699; *Waterman on Set-off*, sec. 465, and cases referred to elsewhere in this note. This doctrine is "but a liberal and beneficent improvement upon the old doctrine of failure of consideration. It looks through the whole contract, treating it as an entirety, and treating the things done and stipulated to be done on each side as the consideration for the things done and stipulated to be done on the other. When either party seeks redress for the breach of stipulations in his favor, it sums up the grievances on each side, instead of the plaintiff's side only, strikes a balance, and gives the difference to the plaintiff, if it is in his favor." *Per* Stephens, J., in *Lufburrow v. Henderson*, 30 Ga. 482. Before considering more particularly the different classes of cases in which this doctrine is applied, it will be proper to examine some of the general principles governing it.

HOW DISTINGUISHED FROM SET-OFF AND COUNTERCLAIM.—Recoupment is distinguished from set-off in three important particulars: 1. The damages which the defendant seeks to recoup must arise out of the same transaction as the plaintiff's claim; 2. The damages need not be liquidated; 3. The judgment is controlled by common law rules, and not by statutory regulations: *Wheat v. Dotson*, 12 Ark. 699; *Ward v. Fellers*, 3 Mich. 281; *Myers v. Estell*, 47 Miss. 4; *Baltimore etc. R. R. Co. v. Jameson*, 13 W. Va. 838; S. C., 31 Am. Rep. 775; *Waterman on Set-off*, sec. 464. Counterclaim is a statutory term. In some of the states it includes both recoupment and set-off: *Gordon v. Bruner*, 49 Mo. 570; *Leavenworth v. Packer*, 52 Barb. 132; *Boston etc. Mills v. Hull*, 37 How. Pr. 299; *Stewart v. Bock*, 1 Hilt. 122; *Murden v. Priment*, Id. 75. In other states it seems to be merely an extension of the remedy of recoupment: *Bloom v. Lehman*, 27 Ark. 489; *Slayback v. Jones*, 9 Ind. 470. Without referring particularly to the statutes of the several states on this subject, it is sufficient to say that whether the defense of counterclaim includes set-off or not, it is generally an enlargement of the remedy of recoupment. Every defense which was admissible by way of recoupment before the statute is also admissible as a counterclaim. Under the statutes of counterclaim, however, the defendant may generally recover an excess of damages in his favor: *Boston etc. Mills v. Hull*, 37 How. Pr. 299; *Springdale Cemetery Ass. v. Smith*, 32 Ill. 252; *Overton v. Phelan*, 2 Head. 445; *Mason v. Heyward*, 3 Minn. 182; *Gordon v. Bruner*, 49 Mo. 570. Recoupment, on the contrary, as the term itself implies, is limited to a mere reduction of the plaintiff's demand, and though if the defendant's damages exceed or equal that demand the plaintiff can recover nothing, the defendant can recover no excess: 2 Sedg. Meas. Dam., 7th ed., 273; *Britton v. Turner*, 26 Am. Dec. 713; *Brunson v. Martin*, 17 Ark. 270; *Streeter v. Streeter*, 43 Ill. 156; *Holcraft v. Mellott*, 57 Ind. 539; *Fowler v. Payne*, 52 Miss. 210; *Ward v. Fellers*, 3 Mich. 281.

MUST ARISE OUT OF SAME TRANSACTION AS PLAINTIFF'S CLAIM.—It is an indispensable requisite to the allowance of the remedy of recoupment, that the damages to be recouped should grow out of the very transaction upon which the plaintiff's claim is founded. If they arise from the breach of an independent contract or from an independent wrong, unconnected with the plaintiff's cause of action, there can be no recoupment: *Mayberry v. Leach*, 58 Ala. 339; *Desha v. Robinson*, 17 Ark. 228; *Bloom v. Lehman*, 27 Id. 489; *White v. Reagan*, 32 Id. 281; *Hart v. Francis*, 2 Col. 719; *Taylor v. Hardin*, 38 Ga. 577; *Sanger v. Fincher*, 27 Ill. 346; *Waterman v. Clark*, 76 Id. 428; *Evans v. Hughey*, Id. 115; *Fessenden v. Forest Paper Co.*, 63 Me. 175; *Sawyer v. Wiswell*, 9 Allen, 39; *Bartlett v. Furrington*, 120 Mass. 284; *Cram v. Dres-*

ser, 2 Sandf. 120; *Pierce v. Cameron*, 7 Rich. L. 114; *Hulme v. Brown*, 3 Heisk. 679; *Nashville etc. R. R. Co. v. Chumley*, 6 Id. 327. This arises from the nature of the remedy, as indicated by Stephens, J., in *Lufburrow v. Henderson*, 30 Ga. 482, above quoted. In its modern applications, the foundation of recoupment is failure of consideration. The defendant, in effect, admits his failure to perform the contract upon which he is sued, and seeks to extenuate his default by showing that the plaintiff has failed, in some particular, to do that which was the consideration of the defendant's promise, and to that extent, therefore, that the plaintiff has no right to hold the defendant liable. Hence it is essential that the wrong of which the defendant complains should, in some way, impair the consideration of his contract. In other words, it must appear that the express or implied promise broken by the plaintiff, was the consideration for the defendant's promise. Therefore, in an action by a laborer for his wages, the employer can not recoup damages for an injury done by the plaintiff outside the scope of his employment: *Nashville etc. R. R. Co. v. Chumley*, 6 Heisk. 327. So in an action by a landlord to recover rent, the tenant can not recoup damages for a trespass committed by the landlord which does not amount to a breach of the covenant of quiet enjoyment: *Cram v. Dresser*, 2 Sandf. 120; *Edgerton v. Page*, 20 N. Y. 281; *Bartlett v. Farrington*, 120 Mass. 284; *Hulme v. Brown*, 3 Heisk. 679. So a purchaser of land can not recoup against his vendor in an action for the purchase money, for a trespass by the latter in subsequently entering and taking the crops: *Slayback v. Jones*, 9 Ind. 470. In an action to recover for repairing machines the defendant can not recoup for a breach of a prior contract by a firm of which the plaintiff was a member in the construction of the same machines: *Fessenden v. Forest Paper Co.*, 63 Me. 175. So in an action by an agent against his principal, to recover compensation for selling land under a particular employment, it has been held that the principal could not recoup for the neglect of the agent to record a mortgage subsequently taken, under independent instructions, to secure the price of the land and of certain chattels afterwards sold by the principal, whereby certain liens attached upon the mortgaged premises, which, however, still left the mortgage a sufficient security for the price of the land: *Evans v. Hughey*, 76 Ill. 115. Where a vendor having sold certain chattels, part of which are paid for, takes a note for the price of the residue and subsequently sues thereon, the defendant can not recoup for a breach of warranty of the chattels already paid for, as they formed no part of the consideration of the note: *Molby v. Johnson*, 17 Mich. 382. In *Winthrop Savings Bank v. Jackson*, 67 Me. 570; S. C., 24 Am. Rep. 56, it was held that the pledging of a bond as collateral security for a note was so far an independent transaction that in an action on the note the pledgor could not recoup damages for the loss of the bond by theft, after the maturity of the note but before its payment.

Much less can the maker of a note, for money borrowed to pay for a chattel, recoup against such note damages for a breach of warranty of the chattel: *Pierce v. Cameron*, 7 Rich. L. 114. In case of a parol contract for the future delivery in separate installments of a quantity of goods, each shipment to be paid for as received, where the contract would be void by the statute of frauds if treated as entire, each shipment will be regarded as a distinct sale, and in an action for the price of the last shipment the defendant can not recoup for defects in the goods previously shipped and paid for: *Seymour v. Davis*, 2 Sandf. 239; *Deming v. Kemp*, 4 Id. 147. Where a defendant having borrowed money of the plaintiff to invest in a partnership with the latter, is afterwards sued therefor, he can not recoup for a breach of the agreement relating to partnership matters: *Taylor v. Hardin*, 38 Ga. 577. In an action

on a note given in discharge of a previous contract upon which the defendant was surety for certain other parties, where the defendant employed the plaintiff as attorney to draw a mortgage to him from such other parties to secure him against liability on the contract, it was held that damages for the plaintiff's negligence in so drawing the mortgage that a certain right of dower was not released, could not be recouped: *White v. Reagan*, 32 Ark. 281. A principal sued by his factor for a general balance, can not, it seems, recoup damages for the plaintiff's negligence in not selling certain goods shipped to him for sale, where that matter forms no part of the balance sued for: *Mayerberry v. Leach*, 58 Ala. 339. Otherwise where advances on those goods form part of the balance: *Dodge v. Tileston*, 12 Pick. 328. Damages for maliciously suing out an attachment in a suit have been held not to be subject to recoupment in the same suit, because the wrong was in no way connected with the consideration of the contract sued on, but was an independent tort: *Nolle v. Thompson*, 3 Metc. (Ky.) 121. But in Texas such damages have been declared to be a proper subject for a plea in reconvention: *Reed v. Samuels*, 22 Tex. 114. In an action on a due-bill, a claim to recoup damages for a seizure and detention of the defendant's cattle as security for payment, was disallowed as being an independent tort, in *Hart v. Francis*, 2 Col. 719.

But although it is necessary that the plaintiff's claim and the defendant's damages should grow out of the same contract or transaction, to admit of recoupment all the stipulations on both sides need not appear in the same instrument. They may appear in different instruments, or they may be in writing on one side, and oral on the other: *Batterman v. Pierce*, 3 Hill, 171; *Key v. Henson*, 17 Ark. 254; *Mell v. Moony*, 30 Ga. 413. Thus, where the plaintiff sold certain standing wood to the defendants, which they were to have a certain time to remove, and guaranteed them against loss by fire from burning over adjacent fallow land, and took a note for the price, it was held, in an action on the note, that the defendants could recoup damages for a destruction of the wood by the fire guaranteed against: *Batterman v. Pierce*, 3 Hill, 171; and Bronson, J., delivering the opinion, said: "It is undoubtedly true that there can be no recoupment by setting up the breach of an independent contract on the part of the plaintiff; but that is not this case. Here, there were mutual stipulations between the parties, all made at the same time, and relating to the same subject-matter; and there can be no difference, in principle, whether the whole transaction is embodied in one written instrument setting forth the cross-obligations of both parties, or whether it takes the form of a separate and distinct undertaking by each party." Further on in the same opinion his honor said: "The nature of the transaction can not be changed by putting the several stipulations of the parties into the form of distinct written contracts; nor can it make any substantial difference that the undertaking of one party has been reduced to writing, while the engagement of the other party remains in parol. In substance, it is still the case of mutual stipulations between the same parties, made at the same time, and relating to the same subject-matter." In accordance with this doctrine, it is held, that in an action on a note the defendant may recoup for a breach of a written agreement to convey stock, which was the consideration of the note: *Hill v. Southwick*, 9 R. I. 299; S. C., 11 Am. Rep. 250; or for a breach of an agreement to assign certain executions which was the consideration of the note: *Desha v. Robinson*, 17 Ark. 228. Where on a sale of a number of chattels three notes were taken for the price, two of which were afterwards paid, in an action on the remaining note, the defendant was permitted to recoup for a breach of warranty of one of the chattels, because its value formed part of the consideration of each of the notes: *Judd v. Dennison*, 10 Wend.

512. So where the plaintiff sold certain chattels to the defendant and took his note therefor, nothing being said as to the delivery, and subsequently made an agreement for delivery at a future time, a breach of this agreement was held a proper subject for recoupment in an action on the note: *Branch v. Wilson*, 12 Fla. 543. Where the plaintiff and defendant exchanged horses, each executing a bill of sale, it was held, in an action for breach of warranty of one of the horses, damages for a breach of warranty as to the other might be recouped: *Eckles v. Carter*, 26 Ala. 563. So in an action for fraudulent representations as to one of the horses in such a case, fraudulent representations as to the other may be made a subject of recoupment: *Carey v. Gullow*, 105 Mass. 18; S. C., 7 Am. Rep. 494. Where the defendant contracted with the plaintiff for the manufacture of certain lumber, and, to enable him to execute the contract, put him in possession of his (the defendant's) mill, taking a bond from the plaintiff and a third person, for the return of the mill on the completion of the contract, in an action for the price of the lumber the defendant was allowed to recoup damages for a breach of the agreement to return the mill: *Sanger v. Fincher*, 27 Ill. 346. In an action for the use of a division fence, it was held that the defendant could recoup damages from the plaintiff's cattle breaking through the fence into the defendant's field, the goodness of the fence being an essential element in the consideration upon which the defendant's liability to pay was founded: *Scott v. Kenton*, 81 Id. 96. In *Turner v. Gibbs*, 50 Mo. 556, it was held, however, that in an action to recover for building a fence, damages from cattle breaking through it could not be recouped because too remote.

It is well settled in Illinois that a claim for damages arising *ex delicto*, may be recouped in an action *ex contractu*, and *vice versa*, if both claims spring from the same transaction: *Stow v. Yarwood*, 14 Ill. 424; *Brigham v. Hawley*, 17 Id. 38; *Streeter v. Streeter*, 43 Id. 156. Thus in trover for certain engines which the defendant contracted to put up and repair for the plaintiff, and which he converted to his own use, he was allowed to recoup for the value of his labor thereon: *Stow v. Yarwood*, *supra*. In substance, however, this was an action for the breach of the defendant's agreement to repair and deliver the engines. So where the defendants, having employed the plaintiff to quarry stone, discharged him because he was not getting out the stone fast enough, in an action brought by him to recover for his work, they were permitted to recoup damages caused by his taking away and hiding certain tools which they had let him have to prosecute the work: *Brigham v. Hawley*, 17 Ill. 38. Here also there was a breach of an implied agreement to return the tools.

UNLIQUIDATED DAMAGES, SUBJECT OF.—It is well settled that unliquidated damages, growing out of the same transaction from which the plaintiff's cause of action arises, may be recouped: *Robinson v. Mace*, 16 Ark. 97; *Stoddard v. Treadwell*, 26 Cal. 294; *Grimes v. Reese*, 30 Ga. 330; *Sanger v. Fincher*, 27 Ill. 346; *Taylor v. Stowell*, 4 Metc. (Ky.) 175; *Herbert v. Ford*, 29 Me. 546; *Batterman v. Pierce*, 3 Hill, 171; *Keyes v. Western Vermont Slate Co.*, 34 Vt. 81. But the damages must not be so uncertain or indefinite as to be incapable of computation or estimation: *Pettee v. Tennessee Mfg. Co.*, 1 Sneed, 381; *Pulsifer v. Hotchkiss*, 12 Conn. 233; *Gold v. Ives*, 29 Id. 119; *Avery v. Brown*, 31 Id. 398; *Satchwell v. Williams*, 40 Id. 371; *Meyer v. Stookley*, 3 Brad. (Ill.) 336. But it is no objection that the defendant can only state his damages proximately: *Satchwell v. Williams*, 40 Conn. 371. The Connecticut cases are particularly stringent in requiring that the damages shall be capable of definite computation, where the action is on a note.

REMEDY OF, EXISTS WHEREVER CROSS-ACTION WOULD LIE.—The right of a defendant to a recoupment of damages exists wherever he could himself maintain an action for the same injury, if, as already stated, the damages arise out of the transaction upon which the plaintiff's action is based: *Peden v. Moore*, 21 Am. Dec. 649; *Houston v. Young*, 7 Ind. 200; *Peck v. Brewer*, 48 Ill. 54. Indeed, the right to bring a cross-action is said to be the basis and test of the right to recoupment: *Desha v. Robinson*, 17 Ark. 228; *Clark v. Wildridge*, 5 Ind. 176; *Lewis v. Woodfolk*, 58 Tenn. 25. It is certain, however, that there may be recoupment in some cases against a plaintiff who would not be liable to a cross-action. So it may exist in favor of a defendant who could not bring a cross-action: See *post*. The remedy by recoupment is favored to prevent circuity of action: *Wheat v. Dotson*, 12 Ark. 699; *Houston v. Young*, 7 Ind. 200; *Peck v. Brewer*, 48 Ill. 54; *Miller v. Gaither*, 3 Bush. 152; *Harrington v. Stratton*, 22 Pick. 517; *Platt v. Brand*, 26 Mich. 173; *Mason v. Heyward*, 3 Minn. 182.

ELECTION TO RECOUP OR TO SUE.—Where a defendant in an action has ground for a recoupment of damages he has an election either to interpose the defense in that action or to bring an independent action therefor: *Ward v. Fellers*, 3 Mich. 281; *Reab v. McAllister*, 8 Wend. 109; *Cook v. Moseley*, 13 Id. 277; *Sinclair v. Neill*, 1 Hun. 83; S. C., 3 T. & C. 77. Although it was said by Lord Ellenborough in *Fisher v. Samuda*, 1 Camp. 190, that where a purchaser of a chattel fails to set up a breach of warranty in an action for the price, but permits a full recovery, he can not afterwards sue for the breach. Even though the defendant has already brought suit for his damages, he may nevertheless recoup them in a subsequent action against him: *Wiltse v. Northam*, 3 Bosw. 162; *Fabbricotti v. Launitz*, 3 Sandf. 743; *Naylor v. Schenck*, 3 E. D. Smith, 135. But he can not press his action and his claim for recoupment at the same time. Upon interposing his defense he must elect either to insist in that action upon his right to recoupment or to waive it and continue his own action: *Fabbricotti v. Launitz*, 3 Sandf. 743. After recoupment of damages in one action it would seem to be clear upon principle that a party can not afterwards sue for other damages existing at the time arising out of the same injury. And so the authorities hold: *Britton v. Turner*, 26 Am. Dec. 713; *McLane v. Miller*, 12 Ala. 643; *Ward v. Fellers*, 3 Mich. 281; *Jones v. Scriven*, 8 Johns. 453. On the other hand, Mr. Waterman says that this question is not yet determined: *Waterman on Set-off*, sec. 589. It is contrary to fundamental legal principles for one to try a single cause of action piecemeal. But, of course, if there are any damages growing out of the same injury which could not be recouped in the first action, the recoupment is not a bar to a subsequent action for those damages: *McLane v. Miller*, 12 Ala. 643. So where subsequent damages accrue from the same injury: *Mondel v. Steel*, 8 Mee. & W. 858. So where in an action against him the defendant attempts to recoup his damages, but the question is taken from the jury by the court: *Earl v. Bull*, 15 Cal. 421.

MEASURE OF DAMAGES IN RECOUPMENT is in general the same as if the defendant were himself suing for the injury of which he complains: *Myers v. Estell*, 47 Miss. 4; *Estell v. Myers*, 54 Id. 174; *Ranley v. Woodward*, 2 Lana. 419. The limit of the right of recoupment is the actual damage suffered by the defendant directly and proximately from the injury, within the amount claimed by the plaintiff: *Satchwell v. Williams*, 40 Conn. 371. Remote and speculative damages, such as the loss of profits through delays in collateral enterprises, are no more a subject of recoupment than of recovery in an independent action: *Pettee v. Tennessee Mfg. Co.*, 1 Sneed, 381; *Finney v. Cad-*

wallader, 55 Ga. 75; *Horner v. Wood*, 16 Barb. 386; *Griffin v. Colver*, 22 Id. 587; *Taylor v. Maguire*, 12 Mo. 313; *Blanchard v. Ely*, 34 Am. Dec. 250, and note. But see *Wade v. Haycock*, 25 Pa. St. 382, where, contrary to the doctrine of some of these cases, a recoupment for loss of profits while a mill was lying idle owing to the necessity of repairing defects in its construction, was permitted in an action by a millwright to recover the price of the building of the mill. The damages recoupable are not merely those existing at the time the action is brought, but all damages accruing down to the time of pleading, as it is held in *Platt v. Branch*, 26 Mich. 173. And in *Martin v. Hill*, 42 Ala. 275, it is decided that the defendant may recoup his damages down to the time of trial.

The defendant can not recoup damages which he might have prevented by reasonable diligence. It is his duty, notwithstanding the plaintiff's default, to lessen the loss, and not to trust wholly to his remedy of recoupment, just as it is where he himself sues for a breach of contract: *Shannon v. Comstock*, 34 Am. Dec. 262; *Keyes v. Western Vt. Slate Co.*, 34 Vt. 81. Hence, in an action for the price of materials furnished for a building, or of logs for sawing, the defendant can not recoup for the whole loss suffered by failure to furnish the same in time, if he could, with reasonable diligence, have procured like materials, or logs, elsewhere, but only for what it would have cost him to obtain such a supply: *Miller v. Mariners' Church*, 20 Am. Dec. 341; *Chapman v. Dease*, 34 Mich. 375; *Hopkins v. Sanford*, 41 Id. 243. See, also, *Hitchcock v. Hunt*, 28 Conn. 343, affirming and illustrating the same principle. But the defendant is not required to go outside the immediate vicinity to supply himself with materials which the plaintiff failed to furnish: *Eddy v. Clement*, 38 Vt. 486. As the defendant is obliged to use reasonable diligence to diminish the loss sustained by the plaintiff's default, he may show what efforts he has made to do so: *Methodist Church v. Ladd*, 22 Mich. 280. And if the evidence is conflicting, the jury should look into the conduct of both the parties, in determining whether damages sought to be recouped were due to the plaintiff's breach of his agreement or to the defendant's negligence: *Hill v. Sibley*, 56 Ga. 531.

BETWEEN WHAT PARTIES MAY EXIST.—It seems that in the absence of any statute requiring it, a claim to recoup need not exist solely in favor of the defendant and against the plaintiff to the action, since it goes merely to the abatement of the plaintiff's recovery, and does not call for a judgment for any balance against him: *McHardy v. Wadsworth*, 8 Mich. 349. Therefore, in an action on a note given by two defendants for a purchase by one, a breach of warranty of the thing sold, may be recouped though it is not entirely mutual: *Id.* And, generally, a surety on a note given for a purchase by his principal has the same right of recoupment for a breach of the contract of sale, as his principal: *Meyer v. Stookey*, 3 Brad. (Ill.) 336. But under the West Virginia statute of set-off, a surety on the bond of an agent for the faithful performance of his duty, can not, in an action for a breach thereof, offset or recoup a claim for services by the agent: *Baltimore etc. R. R. Co. v. Bitner*, 15 W. Va. 455; S. C., 36 Am. Rep. 820. An indorsee after maturity, or an assignee of a note, takes it subject to the maker's right to recoup for a breach of the contract which was the consideration of the note: *Davis v. Clements*, 2 Blackf. 3; *Compere v. Johnson*, 6 Id. 59; *Stilwell v. Chappell*, 30 Ind. 72; *Goodwin v. Morse*, 9 Metc. 278; *Howell v. Medler*, 41 Mich. 641; *Taylor v. Stowell*, 4 Metc. (Ky.) 175; *Rockwell v. Daniels*, 4 Wis. 432; *Ford v. Thomson*, 1 Head, 265. Under the New York statute, a counterclaim is not admissible, unless it exists in favor of the defendant against the plaintiff

in the action. So in other states having similar statutes. Hence the maker of a note can not set up against an indorsee after maturity, or with notice, a counterclaim for damages for a breach, by the payee, of the contract which formed the consideration of the note, though he may show failure of consideration, as an equitable defense to the action: *Gleason v. Moen*, 2 Duer, 639; *Willie v. Northam*, 3 Bosw. 162.

Where a note is taken in the name of the wife of a vendor of land, no consideration moving from her, the vendee may recoup for false representations by the husband as to the boundary: *Kelly v. Pember*, 35 Vt. 183. So where a note is taken in the plaintiff's name for the benefit of a third person, who is the real owner, and remains so at the time of the action, a partial failure of consideration from the latter may be shown by the defendant: *Herbert v. Ford*, 29 Me. 546. A partner in the transaction in which a note is given, to whom the note is subsequently transferred by his copartner, the payee, stands in no better situation, as to recoupment, than the payee himself: *Otis v. Adams*, 41 Id. 258.

WHETHER ACTION ON ORIGINAL CONTRACT OR SECURITY.—In England it was established at an early period, that although the defense of recoupment for a breach of some of the stipulations of a contract on the plaintiff's side, as in case of a breach of warranty on a sale of goods, was admissible, where the action was on the original contract, yet it was not so where the contract on the defendant's side was put into the form of a note or accepted bill, and the action was on such note, unless there was an entire failure of consideration: 2 Sedg., Meas. Dam., 7th ed., 276; Barb. on Set-off, 28; Watson on Set-off, sec. 500; *Fleming v. Simpson*, 1 Camp. 40, note; *Morgan v. Richardson*, Id.; *Tye v. Gwynne*, 2 Id. 346. The theory was that recoupment was allowable only on a *quantum meruit*. In *Tye v. Gwynne*, *supra*, it was said: "A bill of exchange can not be accepted on a *quantum meruit*." And in a later case it was held that a partial failure of consideration of a note was no defense, unless it was a matter of definite computation, and was therefore not allowable where a note was given in payment for a certain invention which turned out to be less valuable than was stipulated: *Day v. Nix*, 9 Moore, 159. In Connecticut a doctrine similar to that of the case last cited was adopted in *Pulsifer v. Hotchkiss*, 12 Conn. 233. And in other cases in that state it is held that damages are not recoupable in an action on a note for goods or the like, unless capable of definite computation: *Gold v. Ives*, 21 Id. 119; *Avery v. Brown*, 31 Id. 398. In *Scudder v. Andrews*, 2 McLean, 464, it was decided that partial failure of consideration was no defense to a note. It is settled, however, in the United States, generally, that the defense of recoupment is equally allowable whether the action is on an original contract of sale or the like, or on a note for the price: *Key v. Henson*, 17 Ark. 254; *Williams v. Miller*, 21 Id. 469; *Harrington v. Stratton*, 22 Pick. 510; *Raspberry v. Moyer*, 23 Miss. 320; *Batterman v. Pierce*, 3 Hill, 171; *Baker v. Nussman*, 1 Hilt. 549; *Hill v. Southwick*, 9 R. I. 299; S. C., 11 Am. Rep. 250; *Kelly v. Pember*, 35 Vt. 183. Ample illustrations of this doctrine are found in the cases cited elsewhere in this note.

WHETHER ALLOWABLE UNDER SEALED INSTRUMENT.—In New York it is established, as laid down in the principal case, that under the revised statutes sealed and unsealed instruments stand on the same footing with respect to the admissibility of inquiry into their consideration, and therefore that recoupment is equally allowable under both: *Case v. Boughton*, 11 Wend. 106; *Ives v. Van Epps*, 22 Id. 155; *Adams v. Hull*, 2 Denio, 312; *Anthony v. Harrison*, 14 Hun, 207. So in Alabama, Arkansas, and Tennessee: *Wheat*

v. *Dotson*, 12 Ark. 699; *Withers v. Greene*, 9 U. S. 213; *Eckles v. Carter*, 26 Ala. 563; *Ford v. Thomson*, 1 Head, 265. In New Jersey, however, recoupment of damages under a sealed contract is not admissible, there being no statute to authorize it: *Price v. Reynolds*, 39 N. J. L. 171; *Wakeman v. Illingworth*, 40 Id. 431.

RECOUPMENT FOR FRAUD, BREACH OF WARRANTY OR OTHER BREACH OF CONTRACT FOR SALE OF CHATTEL.—It is well settled, in accordance with the general doctrine already laid down, that in an action for the price of goods sold, whether on a *quantum valebat*, or a special contract, or upon a note or bill for the price, the vendee may recoup his damages for any breach of the agreement under which the goods were delivered on the part of the vendor, with respect to the quality of the goods, or in any other particular: *Esperly v. Bailey*, 3 Ind. 72; *Porter v. Woods*, 3 Humph. 56; *Noble v. James*, 2 Grant (Pa.), 278; *Peden v. Moore*, 21 Am. Dec. 649. He may, therefore, recoup for false and fraudulent representations by the vendor as to the quality of the goods, or as to their quantity or value: *Andrews v. Wheaton*, 23 Conn. 112; *Peck v. Brewer*, 48 Ill. 54; *Nixon v. Carson*, 38 Iowa, 338; *Harrington v. Stratton*, 22 Pick. 510; *Beecher v. Vrooman*, 13 Johns. 302; *Lewis v. Wilson*, 1 Edw. Ch. 305; *Rawley v. Woodruff*, 2 Lans. 419; *Hogg v. Cardwell*, 4 Sneed, 151; *Withers v. Greene*, 9 How. (U. S.) 213; *Burton v. Stewart*, 20 Am. Dec. 692. But in *Johnson v. Wideman*, Rice, 325, it is said that deceit by the vendor on the sale of a chattel is not a subject of discount in an action for the purchase-money, but may have the effect to discharge the purchaser *pro tanto* from the payment of the price. The distinction is, however, not very important. So the vendee may recoup for a breach of an express warranty of the soundness or quality of the article: *Perley v. Balch*, 34 Am. Dec. 56; *Eckles v. Carter*, 26 Ala. 563; *Williams v. Miller*, 21 Ark. 469; *Earl v. Bull*, 15 Cal. 421; *Hitchcock v. Hunt*, 28 Conn. 343; *Crabtree v. Kile*, 21 Ill. 180; *McClure v. Williams*, 65 Id. 390; *Murray v. Carlin*, 67 Id. 286; *Rudman v. Baldwin*, 2 Ind. 106; *Love v. Oldham*, 22 Id. 51; *Raspberry v. Mays*, 23 Miss. 320; *Reab v. McAllister*, 8 Wend. 109; *Judd v. Dennison*, 10 Id. 512; *Rawley v. Woodruff*, 2 Lans. 419; *Muller v. Eno*, 14 N. Y. 597; *Ford v. Thomson*, 1 Head, 265; *Allen v. Hooker*, 25 Vt. 137; *Street v. Blay*, 2 Barn. & Ad. 456; *Mondel v. Steel*, 8 Mea. & W. 858. So for breach of an express warranty that a machine sold is of a certain power: *Owens v. Sturges*, 67 Ill. 366; or will work for a specified time: *Dean v. Herrold*, 37 Pa. St. 150; or that the vendor will, for a certain period, keep it in repair: *Prairie Farmer Co. v. Taylor*, 69 Ill. 440. So for a breach of an implied warranty that an article manufactured or sold for a certain purpose is fit for the purpose: *Overton v. Phelan*, 2 Head, 445; *Miller v. Gaiher*, 3 Bush, 152; or that it corresponds to a sample exhibited to the purchaser: *Muller v. Eno*, 14 N. Y. 597. So the vendee may recoup damages for a breach of a stipulation or representation in an executory contract for the manufacture of an article that it shall be of a certain quality: *Cassidy v. Le Ferre*, 45 N. Y. 562; or that goods to be delivered shall be of a certain kind: *Warren v. Van Pelt*, 4 E. D. Smith, 202; *King v. Paddock*, 18 Johns. 141; *Spalding v. Vandercook*, 2 Wend. 431; *Andrews v. Eastman*, 41 Vt. 134; or will be delivered in good shipping order: *Stewart v. Bock*, 1 Hilt. 122. A breach of warranty on a sale of a chattel by an administrator is ground of recoupment, it seems, in an action on a note for the price, for although the administrator is not authorized to sell with warranty, yet if he does so and the warranty is broken, there is a failure of consideration *pro tanto*: *Welch v. Hoyt*, 24 Ill. 117. A warranty is part of the consideration in every sale with warranty, and the breach of it turns

the warrantor's right of recovery of the price into a *quantum valebat*: *Allen v. Hooker*, 25 Vt. 137. Of course where there is no warranty or fraud in a contract of sale, the mere unsoundness or want of value of the article sold is no ground for a recoupment against the price, for the rule of *caveat emptor* applies: *Leonard v. Peebles*, 30 Ga. 61; *Hawkins v. King*, Id. 909; *Eagan v. Call*, 34 Pa. St. 236.

The vendee of goods may also, in an action for the agreed price, or on a note therefor, or on a *quantum valebat*, recoup his damages for a non-delivery of part of the goods: *Robertson v. Davenport*, 27 Ala. 574; *Harralson v. Stein*, 50 Id. 347; *Richards v. Shaw*, 67 Ill. 222; *Epperly v. Bailey*, 3 Ind. 72; *Rogers v. Humphrey*, 39 Me. 382; *Platt v. Brand*, 26 Mich. 173; *Champlin v. Rowley*, 18 Wend. 187; *Tipton v. Feitner*, 20 N. Y. 423; *Upton v. Julian*, 7 Ohio St. 95; *Holsworth v. Koch*, 26 Id. 33; *Noble v. James*, 2 Grant (Pa.), 278; *Porter v. Woods*, 3 Humph. 56; or for a non-delivery within the time agreed on, or as rapidly as stipulated: *Havana etc. R. R. Co. v. Walsh*, 85 Ill. 58; *Fabbricotti v. Launitz*, 3 Sandf. 743; *Eddy v. Clement*, 38 Vt. 386. Where the vendee has paid certain duties on goods which were to be delivered free of charge, he may recoup them in an action for the price: *Fitch v. Archibald*, 29 N. J. L. 160. On the other hand, where a vendor was sued for a breach of contract, in failing to deliver part of the goods, and for the inferiority of those delivered, it was held, in *Leavenworth v. Packer*, 52 Barb. 132, that he could recoup against the vendee, who had accepted and retained those delivered, the freight and tolls advanced by him thereon, and also the balance due therefor over and above what had been paid by the vendee. In an action on a note given for the plaintiff's interest in a business, or upon the sale of the good-will of a physician's practice, or the like, the defendant may recoup damages for the breach of an agreement by the plaintiff not to set up in the same business in the same locality: *Lufburrow v. Henderson*, 30 Ga. 482; *Mell v. Mooney*, Id. 413; *Herbert v. Ford*, 29 Me. 546.

WHETHER GOODS MUST BE RETURNED, OR A RETURN TENDERED.—It is clear, as laid down in the principal case, that if a purchaser of goods wishes to rely upon the vendor's fraudulent representations, or breach of warranty, or the like, as a complete bar to an action for the price, he must return or offer to return the goods, or show them to be entirely valueless: *Perley v. Balch*, 34 Am. Dec. 56; *Burton v. Stewart*, 20 Id. 692; *Gifford v. Carvill*, 29 Cal. 589; *Kneidler v. Sternbergh*, 10 How. Pr. 70; *Ely v. Mumford*, 47 Barb. 633. Though if the property is shown to be absolutely worthless, no return or offer of return is necessary: *Sill v. Rood*, 15 Johns. 230; *Shepherd v. Temple*, 3 N. H. 455. So where the vendor had no title, the property need not be returned: *Bliss v. Clark*, 16 Gray, 60. The theory upon which a return of the property or a tender thereof is required in such cases to enable the defendant to plead the plaintiff's fraud or breach of warranty in bar of the action, is that there must be an entire rescission of the contract, and a replacing of the parties *in statu quo*. It was formerly held in England that the same rule applied where the purchaser sought to recoup or recover damages for a breach of warranty: *Leggett v. Cooper*, 2 Stark. 103; *Grimaldi v. White*, 4 Esp. 95; *Fisher v. Samuda*, 1 Camp. 190. And in Connecticut it was held, in *Pulsifer v. Hotchkiss*, 12 Conn. 233, that in an action on a note, the consideration of which, in part, was a certain patent right, as to which there were false representations by the vendor, the vendee could not recoup damages therefor, without returning the article, or offering to do so, because the damages were unliquidated. Bearing in mind, however, that the principle upon which recoupment goes is not rescission, but affirmation of the contract, it is

clear that the vendee's keeping the article as to which the false representations or breach of warranty occurred, affords no objection to the remedy.

It is now well settled, in accordance with this view, that a vendee of chattels may recoup for false representations by the vendor, or for a breach of warranty, without returning or offering to return the articles, and without showing them to be entirely valueless: *Steigleman v. Jeffries*, 7 Am. Dec. 626; *Williams v. Miller*, 21 Ark. 469; *Andrews v. Wheaton*, 23 Conn. 112; *Crabtree v. Kile*, 21 Ill. 180; *Peck v. Brewer*, 48 Id. 54; *Love v. Oldham*, 22 Ind. 51; *Miller v. Gaither*, 3 Bush, 152; *Harrington v. Stratton*, 22 Pick. 510; *Dorr v. Fisher*, 1 Cush. 271; *Raspberry v. Moye*, 23 Miss. 320; *Reab v. McAllister*, 8 Wend. 109; *Muller v. Eno*, 14 N. Y. 597; *Renaud v. Peck*, 2 Hilt. 137; *Ford v. Thomson*, 1 Head, 265; *Withers v. Greene*, 9 How. (U. S.) 213; *Poulton v. Lattimore*, 9 Barn. & Cress. 259. So where the sale is by sample, or with express warranty, and the defendant has sold the goods: *Muller v. Eno*, 14 N. Y. 597; *Renaud v. Peck*, 2 Hilt. 137. In case of a sale by an executor, however, it is held that the purchaser can not, in an action for the price, take advantage of false representations by the executor, either as a bar, or by way of recoupment, without offering to rescind: *Westfall v. Dungan*, 14 Ohio St. 276. It is said that there is a distinction between a warranty in an executed sale and a warranty of an article to be manufactured and delivered, and that in the former case the purchaser may recoup for a breach without returning the article, but that in the latter if he receives the article it is conclusive evidence that it corresponds with the warranty: *Cook v. Gray*, 2 Bush, 121. The distinction does not seem, however, to rest on any solid basis. It is not easy to perceive why a vendee under an executory contract may not accept an article which does not correspond to the warranty, and claim compensation for its deficiencies, just as he may do where the contract is executed. It is reasonable that the acceptance of the article by the vendee in the former case without objection should be held to be evidence of its being in accordance with the contract, but it ought not to be held conclusive evidence. The correct doctrine as it seems to us is, that it is merely presumptive evidence: *Muller v. Eno*, 14 N. Y. 597. There are cases holding that where a vendee contracts for the future delivery of goods of a particular kind, and receives and retains them, he can not be allowed in an action for the price to recoup damages because they are not of the stipulated kind, and that he can not accept part of them and refuse to receive the residue, and then go for recoupment: *Delafeld v. De Grauw*, 3 Keyes, 467; *Shields v. Pattee*, 2 Sandf. 262. In the latter case the defendants contracted for certain iron of a particular kind, and after receiving part, refused to take the residue, and in an action for the price endeavored to recoup damages because the iron was not of the kind called for by the contract; but it was decided that they could not do so, because this amounted to affirming the contract in part and rejecting it in part. The acceptance of part of a quantity of wood under a very similar contract was held in *Andrews v. Eastman*, 41 Vt. 134, to be no bar to a recoupment. And where a vendor agreed to sell a quantity of hats, and to deliver extra hat-crowns to match, free of charge, and the hat-crowns delivered did not match, the purchaser, notwithstanding her acceptance and retention of the hats, was permitted, in an action for the price, to recoup damages for the breach of the agreement: *King v. Paddock*, 18 Johns. 141. In *Warren v. Van Pelt*, 4 E. D. Smith, 202, the rule laid down is that where one contracts to deliver goods of a particular description, if there is no fraud and the description does not amount to an express warranty, the purchaser can not receive and keep the goods and recoup his damages because they are not of the stipulated kind; but that otherwise he may.

RECOUPMENT IN CONTRACTS FOR WORK AND LABOR.--The doctrine of recoupment has been very frequently applied in actions for the recovery of wages for labor performed. It is well settled, that where an employee sues for compensation for labor performed under a special contract, the employer may recoup damages for the non-performance of some of the stipulations of the contract by the plaintiff: *Blodgett v. Berlin Mills Co.*, 52 N. H. 215; as in the case of labor performed under a building contract where the work has not been done according to the contract, unless the deviations were sanctioned by the defendant: *Adlard v. Muldoon*, 45 Ill. 193; *Queen v. Doolan*, 55 Id. 526; *Estep v. Fenton*, 66 Id. 467; *Cooke v. Preble*, 80 Id. 381; *McCausland v. Cresap*, 3 Iowa, 161; *Haysler v. Owen*, 61 Mo. 270. So though the building has been accepted: *Adlard v. Muldoon*, 45 Ill. 193; *Estep v. Fenton*, 66 Id. 467. And the measure of damages is what it would cost to make the building conform to the contract: *Haysler v. Owen*, 61 Mo. 270; *Thornton v. Place*, 1 Moo. & R. 218. So where the plaintiff, not having fully performed the contract, sues on a *quantum meruit*, the defendant may set out the contract and recoup damages for the failure to perform it: *Britton v. Turner*, 26 Am. Dec. 713; *Sickels v. Pattison*, 28 Id. 527; *Duncan v. Baker*, 21 Kan. 99; *Elliot v. Heath*, 14 N. H. 131; *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333; *Dermott v. Jones*, 12 Wall. 1. But where a contract for labor has been substantially though not entirely performed, and a note has been given for less than the value of the work performed, the non-performance of the residue can not be recouped in an action on the note: *Walker v. Millard*, 29 N. Y. 375. Damages for not performing the contract within the time specified may also be recouped in an action on the contract, or on a *quantum meruit* for compensation: *Front etc. R. R. Co. v. Butler*, 50 Cal. 574; *Cooke v. Preble*, 80 Ill. 381; *Abbott v. Gatch*, 13 Md. 314; *Barber v. Rose*, 5 Hill, 76; *Wagner v. Corkhill*, 40 Barb. 175; *Cooke v. Rhine*, 1 Bay, 16. Particularly where the plaintiff agreed in the contract to forfeit a stipulated sum per week for every week that the completion of the work should be delayed beyond a specified time: *Duckworth v. Allison*, 1 Mec. & W. 412. Damages for defective and unskillful workmanship and poor materials employed in building a house, mill, wall, bridge, steamboat, or other structure, under a contract, may be recouped in an action on the contract or on a *quantum meruit* for the agreed compensation or for the value of the work, whether there has been an express warranty of skill or of the soundness of the materials or not, for in every such contract there is an implied warranty by the party undertaking it, that he is skilled in his calling, and that such materials as he furnishes for use in the structure are fit for the purpose: *Blanchard v. Ely*, 34 Am. Dec. 250; *English v. Wilson*, 34 Ala. 201; *Higgins v. Lee*, 16 Ill. 495; *Springdale Cemetery Association v. Smith*, 32 Id. 252; *Mitchell v. Wiscotta Land Co.*, 3 Iowa, 209; *Ives v. Van Epps*, 23 Wend. 155; *Bloodgood v. Ingoldsby*, 1 Hilt. 388; *Norris v. La Farge*, 3 E. D. Smith, 375; *Wade v. Haycock*, 25 Pa. St. 382; *Wright v. Cumpsty*, 41 Id. 102; *Overton v. Phelan*, 2 Head. 445; *Allen v. Hooker*, 25 Vt. 137; *Van Buren v. Digges*, 11 How. (U. S.) 461. And if the work is entirely worthless so that the structure falls down, payment may be resisted altogether: *Taft v. Montague*, 7 Am. Dec. 215.

The fact that the defendant has accepted the work makes no difference any more than in the case of other warranties: *Mitchell v. Wiscotta Land Co.*, 3 Iowa, 209; *English v. Wilson*, 34 Ala. 201. Recoupment of damages for defective workmanship in cases of contracts to perform other work requiring skill is admissible also in actions for wages or on a *quantum meruit*: *Field v. Ringo*, 7 Ark. 435; *Robinson v. Mace*, 16 Id. 97; *Bee Printing Co. v. Hickborn*, 4 Allen, 63; *Locke v. Smith*, 10 Johns. 250; *Grant v. Button*, 14 Id. 377;

Henson v. Morton, 2 Ashm. 150; *Swift v. Harrison*, 30 Vt. 607. So where the employee sues the employer for breach of other stipulations in the contract, damages for unskillful and unworkmanlike performance of the labor may be recouped: *Keyes v. Western Vermont Slate Co.*, 34 Id. 81. An error committed by an attorney, which a cautious man might fall into, will not defeat an action for the amount of his bill: *Montrious v. Jefferys*, 2 Car. & P. 113. Fortunately "no attorney is bound to know all the law:" Id. In North Carolina it is held that where an overseer sues for wages on his contract, having served the stipulated time, his employer can not recoup damages on the ground that the plaintiff was lazy and trifling, and made a poor crop, though it would be otherwise if the action were on a *quantum meruit*: *Hobbs v. Reddick*, 5 Jones' L. 80. Damages occasioned by the negligence and unfaithfulness of an employee in the performance of his duties may be recouped in an action for wages: *Mobile etc. R. R. Co. v. Clanton*, 59 Ala. 392; *Brunson v. Martin*, 17 Ark. 270; *Lee v. Clements*, 48 Ga. 128; *Houston v. Young*, 7 Ind. 200; *Stoddard v. Treadwell*, 26 Cal. 294; *Still v. Hall*, 20 Wend. 51; *Phelps v. Paris*, 39 Vt. 511; *Gilley's Administrator v. Tenney*, 31 Id. 401; *De Witt v. Cullings*, 32 Wis. 298; *Denew v. Daverell*, 3 Camp. 451. So where by such negligence an injury is done to a third person for which the employer is responsible: *Campbell v. Somerville*, 114 Mass. 334. But damages for an injury caused by the employee by an act outside the scope of his employment can not be recouped in an action brought by him for wages: *Nashville etc. R. R. Co. v. Chumley*, 6 Heisk. 327. So damages for loss of property of the employer through the employee's negligence, or for the willful destruction or embezzlement of property, may be recouped in an action for wages: *Heck v. Shener*, 8 Am. Dec. 700; *Brunson v. Martin*, 17 Ark. 270; *Allaire Works v. Guion*, 10 Barb. 55. Especially where the plaintiff has agreed to pay for goods lost by his negligence: *Le Loir v. Bristow*, 4 Camp. 134.

Where one employed to perform labor agrees to find certain materials but fails to do so, and they are furnished by the employer, he may recoup their value in an action for compensation for the services: *Newton v. Forster*, 12 Mee. & W. 772. So where a railroad contractor undertakes to procure the right of way from land-owners along the line, but fails to pay to some of them their damages, leaving the company liable therefor, the amount may be recouped in an action for the contract price: *Barker v. Troy etc. R. R. Co.*, 27 Vt. 766. Where one agrees to furnish miners with an outfit for a share in their earnings, and subsequently sues for such share, the defendants may recoup damages for non-performance of part of his engagement as to the outfit: *Logan v. Tibbott*, 4 G. Greene, 389.

Where an employee or servant enters into an employment with an express or implied agreement to give a certain number of days' notice before leaving, but fails to do so, damages caused by such failure, before the employer can supply his place, may be recouped in an action for wages: *Satchwell v. Williams*, 40 Conn. 371; *Hunt v. Otis Co.*, 4 Metc. 464.

QUESTION WHETHER CONTRACT FOR GOODS OR SERVICES IS ENTIRE OR NOT, and as to whether the party having partly performed it can recover for such part performance on a *quantum meruit*, is discussed in the note to *Hayward v. Leonard*, 19 Am. Dec. 268. That question is not very material in determining whether the defendant may recoup for the part not performed. Whether the contract is entire or not, if the defendant chooses he certainly has the right to accept the part performance, and recoup his damages for the residue, instead of relying upon the failure of entire performance as a bar: *Berry v. Diamond*, 19 Ark. 262; *Fessler v. Love*, 43 Pa. St. 313; although ow-

ing to the contract being entire, the plaintiff when sued for a breach might not be able to recoup his part performance: *Stephens v. Beard*, 4 Wend. 604. In an action by an infant for part performance of a contract for work and labor where the service is voluntarily abandoned before the end of the term, it is held in a number of cases that the employer may recoup for non-performance of the residue: *Moses v. Stevens*, 2 Pick. 332; *Moulton v. Trask*, 9 Metc. 577; *Thomas v. Dike*, 11 Vt. 273; see also *Lowen v. Crossman*, 8 Iowa, 325. This doctrine is denied, however, in *Whitmarsh v. Hall*, 3 Denio, 375, on the ground that an infant has an election to avoid his contract and recover the value of his services upon an implied *assumpsit*, and that the adult employer can not defeat such election and indirectly enforce the contract by recovering damages for its breach.

RECOUPMENT IN CONTRACTS FOR SALE OF REALTY.—It is well settled that a vendee of land, who has accepted a conveyance and is in possession, can not resist an action for the payment of the price on the ground of the vendor's fraud: *Cullum v. Branch Bank*, 37 Am. Dec. 725; *Giles v. Williams*, Id. 692, and cases cited in the notes thereto. But it is equally settled that he may, in an action or suit to recover the purchase money or to enforce a security given therefor, recoup damages for false and fraudulent representations by the vendor as to the location, boundaries, quantity, quality, and natural advantages of the land, and as to timber and improvements thereon, and the like: *State v. Gaillard*, 1 Id. 628; *Melford v. Shepard*, 33 Id. 432; *Couse v. Boyles*, 38 Id. 514; *Barnes v. Anderson*, 21 Ark. 125; *Goodwin v. Robinson*, 30 Id. 535; *James v. Elliott*, 44 Ga. 237; *Swan v. Ewing*, Morris (Iowa), 344; *Moberly v. Alexander*, 19 Iowa, 162; *Coburn v. Ware*, 30 Me. 202; *Myers v. Estell*, 47 Miss. 4; *Estell v. Myers*, 54 Id. 174; *House v. Marshall*, 18 Mo. 368; *Allen v. Shackleton*, 15 Ohio St. 145; *Adams v. Wylie*, 1 Nott & M. 78; *Tunno v. Fludd*, 1 McCord, 121; *Abercrombie v. Owings*, 2 Rich. 127; *Lewis v. Woodfolk*, 58 Tenn. 25; *Kelly v. Pember*, 35 Vt. 183. See generally, as to fraudulent representations by a vendor of land, the note to *Boswick v. Lewis*, 2 Am. Dec. 77. No offer to rescind the contract is necessary to enable a purchaser of land to recoup damages for fraudulent representations by the vendor as to the particulars above indicated: *Goodwin v. Robinson*, 30 Ark. 535; *Myers v. Estell*, 47 Miss. 4; *Kelly v. Pember*, 35 Vt. 183. The vendee of land may also recoup in an action for the purchase money for fixtures, timber, or crops removed by the vendor after the sale, before delivery of possession: *Grand Lodge v. Knox*, 20 Mo. 433; *Gordon v. Bruner*, 49 Id. 570; *Weakland v. Hoffman*, 50 Pa. St. 513. But of course where the removal of a growing crop is a mere trespass, it is not a proper subject of recoupment: *Slayback v. Jones*, 9 Ind. 470. Partial failure of title to land conveyed with warranty, is no ground of recoupment in an action for the purchase money, so long as the grantee remains in undisturbed possession; because, until eviction, there is no breach of the warranty: *Wheat v. Dotson*, 12 Ark. 699; *Key v. Henson*, 17 Id. 254; *Morrison v. Jewell*, 34 Me. 146; *Wentworth v. Goodwin*, 21 Id. 150; *Lamerson v. Marvin*, 8 Barb. 9; *Hill v. Butler*, 6 Ohio St. 207. But as to a breach of the covenant of seisin it is otherwise, for that covenant, if broken at all, is broken as soon as made: *Tallmadge v. Wal's*, 25 Wend. 107; *Tone v. Wilson*, 81 Ill. 529; *Walker v. Wilson*, 13 Wis. 522; *Akerly v. Vilas*, 21 Id. 88; *Lowry v. Hurd*, 7 Minn. 356. In accordance with the rule that mere defect of title is no ground of recoupment where land is conveyed with covenants of warranty and against incumbrances, it is held, that the existence of incumbrances upon the land at the time of conveyance can not be set up to abate the recovery in an action for

the purchase money: *Timms v. Shannon*, 19 Md. 296; *Mills v. Saunders*, 4 Neb. 190; *Whisler v. Hicks*, 5 Blackf. 100; *Smith v. Ackerman*, Id. 541; *Lattin v. Vail*, 17 Wend. 188. But the vendee may discharge an incumbrance and recoup the money expended in so doing: *Holley v. Younge*, 27 Ala. 203; *Brodie v. Watkins*, 31 Ark. 319; *Walker v. Sedgwick*, 8 Cal. 398; *Schuehman v. Knoebel*, 27 Ill. 175; *McDowell v. Milroy*, 69 Id. 498; *Baker v. Railsback*, 4 Ind. 533; *Stilwell v. Chappell*, 30 Id. 72; *Davis v. Bean*, 114 Mass. 358; *Mills v. Saunders*, 4 Neb. 190; *Sheldon v. Simonds*, Wright (Ohio), 724. But it seems that the sum paid to remove the incumbrance must have been the lowest for which it could be got: *Baker v. Railsback*, 4 Ind. 533. It is the sum paid, and not the face-value of the incumbrance, which is recoupable: *McDowell v. Milroy*, 69 Ill. 498; *Davis v. Bean*, 114 Mass. 358. If the land is sold under the lien of the incumbrance and the purchaser buys it in, he may recoup the amount of his bid and interest: *Burk v. Clements*, 16 Ind. 132.

In South Carolina, a defect of title to land conveyed with warranty is admissible by way of discount under the statute without eviction, in an action for the price: *Henning v. Withers*, 6 Am. Dec. 589; *Sumter v. Welsh*, 2 Bay, 558; *Ward v. Revil*, 3 Rich. 427. But there must be a valid outstanding paramount title in another to constitute a ground of recoupment, and a mere unrecorded agreement to convey, or an agreement to convey a mere easement, is not enough: *Williams v. Oliver*, Cheves, 115. If the title conveyed by the defendant's deed is a good, equitable title, which is capable of being converted into a legal title, there can be no recoupment against the purchase money: *Hodges v. Connor*, 1 Speer, 120. It seems also that in Alabama, under the code, a defect of title is admissible by way of recoupment, where land has been conveyed with warranty; *aliter* before the code: *Martin v. Wharton*, 38 Ala. 637.

The existence of a public road across land conveyed with warranty is no ground of recoupment or defalcation from the purchase money: *Peck v. Jones*, 70 Pa. St. 83. A failure of the vendor to furnish his vendee with muniments of title, whereby the latter sustains injury from repeated trespasses, has been held a good ground of defalcation from the purchase money: *Penn v. Preston*, 2 Rawle, 14.

RECOUPMENT IN ACTIONS BETWEEN LANDLORD AND TENANT.—In actions for rent the tenant may recoup damages for false representations by the lessor, that he owned the entire premises, when he owned only a part: *Allaire v. Whitney*, 1 Hill, 484; S. C., 4 Denio, 554; or false representations as to the quality of the leased land: *Avery v. Brown*, 31 Conn. 398; or as to the capacity of a leased mill: *Cage v. Phillips*, 38 Ala. 382; or as to the sanitary condition of the premises: *Burroughs v. Clancy*, 53 Ill. 30. But not for their bad condition, where there are no such representations, and he enters with knowledge of their condition: *Westlake v. De Graw*, 25 Wend. 669. He may also recoup damages for a breach of the covenant of quiet enjoyment: *Tone v. Brace*, 8 Paige, 597; *Mayor etc. of New York v. Mabie*, 13 N. Y. 151; *Holbrook v. Young*, 108 Mass. 83; *Tiley v. Mayers*, 43 Pa. St. 404; *Pepper v. Rawley*, 73 Ill. 262. Therefore he may recoup for an eviction by title paramount from part of the premises, or from the enjoyment of an easement, let therewith: *Tone v. Brace*, 8 Paige, 597; *Blair v. Claxton*, 18 N. Y. 529; *Tiley v. Mayers*, 43 Pa. St. 404. Where he buys in an incumbrance to protect his possession, it is held in Nebraska, under the statute, that he may set it off in an action for the rent: *Thrall v. Omaha Hotel Co.*, 5 Neb. 295; S. C., 25 Am. Rep. 438. He can not recoup for mere trespasses by the lessor: *Cram v. Dresser*, 2 Sandf. 120; *Levy v. Bend*, 1 E. D. Smith, 169; *Mayor*

etc. of New York v. Mabie, 13 N. Y. 151; *Bartlett v. Farrington*, 120 Mass. 284; *Hulme v. Brown*, 3 Heisk. 679. A breach of the lessor's covenant to repair is also good ground for recoupment in an action for rent, or in replevin for goods distrained for rent: *Nichols v. Dusenbury*, 2 N. Y. 283; *Myers v. Burns*, 35 Id. 269; *Whitbeck v. Skinner*, 7 Hill. 53; *Dorwin v. Potter*, 5 Denio, 306; *Martin v. Hill*, 42 Ala. 275; *Fowler v. Payne*, 49 Miss. 32; *Green v. Bell*, 3 Mo. App. 291. Or the tenant may make the repairs himself, and recoup the expense thereof: *Myers v. Burns*, 35 N. Y. 269. He may recoup also for breach of an agreement by the lessor to supply steam-power to the premises: *Crane v. Hardman*, 4 E. D. Smith, 339; or for breach of an agreement implied from the terms of the lease, that a building let for a store will be finished and fitted up for use as such: *La Farge v. Mansfield*, 31 Barb. 345. In *Johnson v. Hoffman*, 53 Mo. 504, it was determined that in an action of forcible entry brought by the lessee against the lessor of premises under a contract to farm on the shares, the defendant could not recoup damages for a breach of the agreement.

IN AN ACTION BY A CARRIER FOR FREIGHT on goods, the defendant may recoup for the non-delivery or loss of part of the goods: *Hinsdell v. Weed*, 5 Denio, 172; *Byrne v. Weeks*, 7 Bosw. 372; *Snow v. Carruth*, 1 Sprague, 324. But in England it is held, that the consignee named in a bill of lading can not, when sued for freight, recoup for goods mentioned in the bill of lading, which were, in fact, never put on board: *Meyer v. Dresser*, 16 Com. B. (N. S.) 646; S. C., 33 L. J. C. P. 289; 12 W. R. 983; 10 L. T. (N. S.) 612. In *Stinson v. Hall*, 1 H. & N. 831; S. C., 26 L. J. Ex. 212, in an action for freight and portorage, the defendant pleaded that part of the claim was for lightering on a quantity of coal which was lost through the plaintiff's negligence, the value thereof being equal to the sum pleaded to, and relied upon the same as an equitable set-off, but it was decided that the plea was bad, and that the defendant must resort to a cross-action. In an action for freight, the defendant may also recoup damages for injury to the goods while in transit, where the injury is one for which the carrier would be liable in an independent action: *Bearse v. Ropes*, 1 Sprague, 331; *Ward v. Fellers*, 3 Mich. 281; *Bancroft v. Peters*, 4 Id. 619; *Ogden v. Coddington*, 2 E. D. Smith, 317; *Schwinger v. Raymond*, 83 N. Y. 192; S. C., 38 Am. Rep. 415. So he may recoup for extra insurance made necessary by a deviation: *Thatcher v. McCulloh*, Olcott, 365. But not where the goods had arrived when the insurance was effected, and there was no unreasonable delay: *Nye v. Ayres*, 1 E. D. Smith, 532.

In case of connected lines of railway belonging to different companies, who divide the freight proportionately for goods carried over the whole line, in an action for freight by one of the companies the defendant may recoup for injuries to the goods on another part of the line: *Fückburg etc. R. R. Co. v. Hanna*, 6 Gray 539. But not for other goods lost at another time on another part of the line: *Merrick v. Gordon*, 20 N. Y. 93.

OTHER INSTANCES OF APPLICATION OF DOCTRINE.—In an action by a warehouseman for advances on goods, the defendant may recoup for a loss of the goods by the plaintiff's negligence: *Hatchett v. Gibson*, 13 Ala. 587. A bailee sued for the conversion of goods may recoup for a lien for labor bestowed thereon: *Longstreet v. Phile*, 39 N. J. L. 63. And where a bailee of a horse hired for a certain journey, is sued for the hire, he may recoup for expenses made necessary in procuring other means of completing the journey, by the horse falling lame on the road without his fault: *Harrington v. Snyder*, 3 Barb. 380. But expenses incurred by the hirer of a chattel, in successfully

defending an action of trover brought against him by the bailor, can not be recouped in an action for the hire: *Deens v. Dunklin*, 33 Ala. 47. Where a debtor pledges property to secure his debt, under an agreement that he is to determine when and how it shall be sold, and the creditor sells in violation of the agreement, in an action against him by the debtor for money had and received, it is held that he may recoup the amount of his debt: *Belden v. Perkins*, 78 Ill. 449

TANNER v. TRUSTEES OF ALBION.

[5 MLL, 121].

TEN-PIN ALLEY KEPT FOR GAIN IS A NUISANCE at common law, and may be prohibited by a municipal corporation under a charter, authorizing it to make by-laws relative to nuisances generally. So, although the rules of such alley expressly forbid all betting.

LEGISLATURE MAY AUTHORIZE MUNICIPAL CORPORATION TO MAKE BY-LAWS for local objects, such as the prevention of nuisances.

ACTION by the trustees of Albion, brought originally before a justice, to recover a penalty for the violation of an ordinance of the village, prohibiting the keeping of ball-alleys for gain. The terms of the ordinance and the clause of the village charter relating to the subject are stated in the opinion. It was admitted that the defendant kept a ten-pin alley in the village, and charged a certain sum, paid by the loser, for every game played thereat, and that on a certain day two persons played a series of games there, and paid the defendant his regular charge for the use of the alley. It was also admitted that there were printed rules posted up in the alley, establishing certain regulations for the playing of the game. Among other rules were the following: "No minors or boys allowed in the alley." "No betting allowed." Judgment for the plaintiffs, affirmed by the common pleas on *certiorari*, and the defendant brought error.

S. R. S. Mather, for the plaintiff in error.

A. Thomas, for the defendant in error.

By Court, COWEN, J. This case has been argued mainly on the general words at the conclusion of the fourth section of the village charter: Sess. L. of 1828, pp. 447, 448. So far as the arguments go on these, they need not be considered; for I am of opinion that the offense prohibited is within the more particular words. Among other things, the trustees are authorized by that section to make by-laws relative to slaughter-houses and nuisances generally. The by-law in question provides, that it shall not be lawful for any person to keep or maintain any ball-alley, or apparatus, alley, machine, building, or inclosure, con-

structed or used for the purpose of playing thereon or therewith, at the game called or known by the name of nine-pins or ten-pins, for gain, hire, reward, or emolument of any kind, or in any manner whatsoever. Establishments of this kind in populous communities are, at best, and even when used without hire, very noisy, and have a tendency to collect idle people together and detain them from their business. When built and kept on foot for gain, the owner is interested to invite and procure as full an attendance as possible, day after day; and for this purpose temptations beyond mere amusement are often resorted to, such as drinking and gaming. So far as I have been able to discover, erections of every kind adapted to sports or amusements, having no useful end, and notoriously fitted up and continued with the view to make a profit for the owner, are considered in the books as nuisances. Not that the law discountenances innocent relaxation; but because it has become matter of general observation, that, when gainful establishments are allowed for their promotion, such establishments are usually perverted into nurseries of vice and crime. Common stages for rope-dancers have been adjudged nuisances at the common law; "not only," says Hawkins, "because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which can not but be very inconvenient to the neighborhood:" 1 Hawk. P. C., by Curwood, c. 32, sec. 6. In the next section he distinguishes between places kept for such useless sports, and play-houses, which were originally instituted for the laudable design of recommending virtue to the imitation of the people and exposing vice and folly. These, he says, are not nuisances in their own nature; but may only become such by accident; whereas the others can not but be nuisances. I mention common stages for rope-dancing, because bowling-alleys were long since held to stand on the same footing: *Jacob Hall's Case*, 1 Mod. 76. Hall, a rope-dancer, had erected a stage, or was about erecting one, at Charing Cross, which the court of king's bench pronounced to be a nuisance. Hale, C. J., mentioned as a precedent, "that in the eighth year of Charles I., Noy came into court and prayed a writ to prohibit a bowling-alley erected near St. Dunstan's Church, and had it." In the report of *Hall's Case*, in 2 Keb. 846, Chief Justice Hale is represented as saying that "Noy prayed a writ to remove a bowling-alley; and had it, without any presentment at all. Thus we see Hawkins is sustained by the highest authority in saying that such places can not but be nuisances.

The tendency of the alley being well known, it was adjudged to be a nuisance of itself; and a writ accordingly issued to remove it without any trial. Now this is not because rope-dancing, or playing at nine-pins, or any other game with bowls is a mischief; nor that being a spectator at a rope-dance is censurable in the least. Such acts are not nuisances. In themselves they are entirely innocent. The nuisance consists in the common and gainful establishment for the purpose of sports, having the aptitude and tendency of which Hawkins speaks; not that this always produces the consequences of which he complains, but because there is imminent danger of its doing so. A deposit of gunpowder—a useful article—among a block of houses, might be very harmless; yet it is a public nuisance, from the danger of explosion: *Anonymous*, 12 Mod. 342. The case of *The People v. Sergeant*, 8 Cow. 139, is relied on, which held that a room kept for the playing of billiards was not a public nuisance, though a profit was made of it. But the court disavow the intent to interfere with the principle laid down by Hawkins. On the contrary, they refer to it with approbation, and admit that the keeping of a gaming-house was an indictable offense at common law. This was held expressly in *Rex v. Dixon*, 10 Mod. 335. Yet the act of gaming was no more criminal by that law than dancing on a rope or playing at cricket. It may be somewhat difficult to reconcile *The People v. Sergeant* with the general principle which seems perfectly well settled; but the case claims no more than that a billiard-room, appearing to be kept in a particular way, forms an exception. In general, the law is not scrupulous about actual results. It sees that a building has been erected for at least an idle purpose, the probable consequences of which will be pernicious. It does not stop, therefore, and call witnesses to prove that it is so in fact. When Hall, the rope-dancer, was brought up, Lord Hale held it enough that the stage had been or was about to be erected. He told him he understood it was a nuisance to the parish. It is true that some of the inhabitants, being present, said it occasioned broils and fightings, and drew so many rogues to the place that they lost things out of their shops every afternoon. But this information was not received as from witnesses. No one could on his oath connect the cause with the effect; and no one appears to have been sworn. All the evils complained of might have existed without the stage. Had the erection been for the purpose of some useful business or object, actual consequences would have been inquired of. But it was the simple case of one

man squandering his time for money, in order to induce others to waste both their time and money.

No one is so blind as not to see that such places, on their becoming known, bring together the most profligate mixtures; brawlers, drunkards, gamblers, blacklegs, pickpockets, and other petit thieves. Lord Hale did not want witnesses of this. All he wanted was the notoriety of the fact—the testimony of experience. According to the report of *Hall's Case* in 2 Keb. 846, there were mere affidavits that Hall was going on to build his booth, which was not yet done. The reporter adds that, after the court were informed of the working, they sent for Hall and the workmen by a tipstaff; “and because he would not enter into a recognizance not to build on, they committed him, and then he ceased.” Ventris gives the same account of the matter: 1 Vent. 169. He says, the complaint was that the booth was erecting, and that Hall intended to show his feats of activity to the annoyance of the complainants “by reason of the crowd of idle and naughty people that would be drawn thither, and their apprentices inveigled from their shops.” The court ordered him to stop, to which he replied, with great impudence, that he had the king’s warrant for it and promise to bear him harmless. After committing him, the court caused a record to be made of the nuisance, as upon their own view, and awarded a writ to the sheriff to prostrate it. All this is only following out the rule of law that a man shall be holden accountable for the probable consequences of his acts; the obvious ground on which the court proceeded a few years before in the case of the bowling-alley without even waiting for a presentment. In *Rex v. Moore*, 3 Barn. & Adol. 184, the defendant was convicted on the ground that he had collected a crowd in his own field for pigeon-shooting, by which the neighborhood was annoyed; and he was held guilty of a nuisance. Littledale, J., said: “No doubt it was not his [the defendant’s] object [to create a nuisance]. If it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind will lead any one to expect the result, he will be answerable for it.” In *Rex v. Howel*, 3 Keb. 465, which was in the 27 Car. II., the court thought an indictment for a nuisance in keeping a cockpit valid at common law; and this again on the authority of the bowling-alley case which they mentioned and said it was pulled down as a common nuisance. In *Rex v. Dixon*, the indictment was simply for keeping a common gaming-house. No consequences were mentioned; and it

did not conclude *ad commune nocumentum*. It was therefore insisted that it could not be good at common law. The court answered, the conclusion was not necessary, because the act was an offense in its own nature.

In the case before us, the rules of playing in Tanner's ball-alley are stated, with an instance of play by persons who hired the alley, and proceeded under the inspection and reckoning of Tanner. I have gone into a consideration of the cases, to show that a building which the law considers a nuisance in its own nature, when kept in a particular way and for a particular purpose, is not to be tested by appearances. It can not be modified by printed rules against the practice of gambling, and by the surveillance of the owner as if to see that they are not violated. The law knows that appearances are often simulated. Vicious houses commonly make loud pretensions to such superior regularity, that, however others may behave, they would be thought an exception. In the case of the ball-alley mentioned by Lord Hale, the court did not send and inquire what appearances of regularity and decency might be affected by the owner. Information that it was a bowling-alley satisfied them; and they issued a writ to abate it, without waiting for a trial. Their own sagacity spoke as to the ultimate effects. If the building had been so far well conducted, so much the better for community. The court determined that it should not afterwards be conducted at all, on account of the consequences which would probably ensue. Suppose a woman to hold out her house as one of ill-fame. Does it take from it the character of a nuisance, that there has been no instance of actual prostitution? Or, on trying it under an indictment, would it be necessary to show a case of prostitution? The law applies, as we have seen, the *presumptio juris et de jure*. A man who should erect a pig-sty under his neighbor's window, could hardly excuse himself by showing that he intended to keep it clean and inoffensive, although the thing is useful in itself. A house in a populous town, divided for poor people to inhabit during the prevalence of an infectious disease, is a nuisance: 1 Roll. Abr. 139, tit. Nusans Common (F), 3. The law does not wait for the disease to spread. It exercises a wise forecast, and repels the evil at the threshold. It does the same thing in favor of public morals and public economy. A useless establishment, wasting the time of the owner, tending to fasten his own idle habits on his family, and to draw the men and boys of the neighborhood into a bad moral atmosphere—a place which, in

despite of every care, will be attended by profligates, with evil communication, and at best with a waste of time and money, followed by the multiplication of paupers and rogues—has always been considered an obvious nuisance.

Surely we have not come to an age when the morality of the law is relaxed beyond what it was in the reign of Charles II., the date of Hall's booth, erected, as he said, by license from the king. This was a very probable account. Charles was known to be the most careless in his moral conduct of any man in his kingdom, and to keep a court which was abandoned to all sorts of licentiousness. The Duke of Buckingham, his principal adviser, was said himself to have been a rope-dancer. It is not very likely that a king whose palace was distinguished for being the largest brothel in Europe, and who is known to have dismissed Lord Clarendon on the joint advice of Buckingham and the Duchess of Cleveland, a prostitute, would hesitate to license any vicious establishment for which such courtiers might invoke his patronage. The rule of the common law becomes more evident, and the precedent referred to more imposing, when thus placed in contrast with the moral waste by which it was surrounded. I must be allowed to protest against the supposition that the same law will, in this age and country, and in such a village as Albion, hold practices to be innocent which were denounced as offenses against public morals and economy in the reign of Charles II. I say Charles II. I am aware that the bowling-alley was torn down in the previous reign; but it was cited as a precedent in point to that of the rope-dancer's booth. The more modern precedents leave no room for suspecting relaxation. In 1 Geo. III. (1761), an indictment at common law was sustained, which charged a house to be disorderly, because the defendant, for his gain, lucre, and profit, invited evil and ill-disposed persons, of ill name and fame, and of dishonest conversation, to congregate in it, where they remained, "fighting of cocks, boxing, playing at cudgels, and misbehaving themselves." *Rex v. Higginson*, 2 Burr. 1232. Coming to our own country, we find the law, as here administered, denouncing penalties against the remotest approaches to moral infection. The act of 1815 incorporating the town of Franklin, in Tennessee, gave the town power, as in the act before us, to make by-laws for the prevention of nuisances. A by-law was passed inflicting a penalty of five dollars on any person who should exhibit a stud-horse in the town. The defendant having exhibited his horse, the supreme court held the act to be a nuisance, on the

principle, as they remarked, which condemned alehouses, gaming-houses, brothels, booths for rope-dancers, mountebanks, and the like: *Nolin v. Mayor and Aldermen of Franklin*, 4 Yerg. 163. The case is the stronger, because the exhibition was in itself necessary in the breeding of horses. Yet the offensive character of the employment, and the place where exercised, were held sufficient to characterize the act as criminal *per se*.

The only argument I have urged in excuse for bowling-alleys is, that the exercise of the players is conducive to health. In this respect such alleys have been compared with bath-houses. The answer is, that there are various other kinds of exercise entirely equivalent; and if not, the means of playing with bowls are easily accessible without those public establishments carried on for hire which the law has denounced as of evil tendency. The playing with cards and dice has been recognized by grave authority as useful in recreating and fitting a person for business: *Bac. Abr., Gaming (A)*. Yet it would scarcely be pretended that a card or dice-room kept for a reward, under the strongest protestations that it was intended solely for recreation, should be tolerated by the law. The pernicious consequence of allowing men to have a pecuniary interest in promoting that sort of play is too well known.

There is no need, therefore, as the counsel for the plaintiff in error supposes, of the corporation showing that the power they have assumed is derivable from the general clause of the statute authorizing by-laws relative "to anything, etc., that may concern the safety, advantage, or good government of said village." The by-law is not "contrary to or inconsistent with the laws of this state or of the United States." It is not, as he supposes, necessary to show actual gambling or actual mischief; and the alley is far from being legitimate in the same sense as the instances he puts of oyster-shops, places of innocent refreshment, recreation, or amusement, or for religious exercise. *The People v. Sergeant* sustains no such view. Or, if it could be carried to the extent contended for, we should be bound to disregard it; at least to prevent its interference with the settled law of nuisance. The application of that law must always be regulated in some measure by the facts of each case, though judges, as we have seen, are bound to notice them judicially, collecting their knowledge from general experience. For one, I should not have thought myself warranted in regarding billiard-rooms as of that venial character which seems to be accorded to them in the case cited. Billiard-tables are denounced by the statute as criminal

appendages to taverns, passenger boats, vessels, etc. I do not remember ever having seen a game of billiards played, and am still further removed from actual knowledge whether the rooms where they are kept have a tendency to promote any kind of moral evil. The information which reached me, however, while upon the circuit, and on which I was in the habit of charging grand juries, was anything but favorable to those places. Were the question *res nova*, I doubt whether I could bring myself to join in the annunciation that a billiard-room kept for lucre, in whatever place, is not a nuisance at the common law. I should certainly hesitate, however, with the case cited before me, and while legislation is so severe upon them when found in certain places, to adjudge that they are within the general principles which I have found applicable to bowling-alleys.

It is said, the constitution gives the legislative power to a senate and assembly, which can not delegate the right to make laws. The answer is, that the words of the constitution comprehend and imply all the accustomed and acknowledged powers of legislation. Among these is the power to create municipal corporations with the right to pass by-laws for local objects.

I am of opinion that the judgment should be affirmed.

Judgment affirmed.

POWER OF MUNICIPAL CORPORATIONS TO PROHIBIT AND PREVENT NUISANCES, and to declare what is a nuisance: See the note to *Milne v. Davidson*, 16 Am. Dec. 191; *Baltimore v. Hughes*, 19 Id. 243; *Tourne v. Lee*, 20 Id. 260; *Baker v. Boston*, 22 Id. 421; *Hart v. Mayor of Albany*, 24 Id. 165; *Watertown v. Cowen*, 27 Id. 80; *People v. Albany*, Id. 95, and note; see also the note to *Robinson v. Mayor of Franklin*, 34 Id. 627, in which the power of municipal corporations to pass by-laws generally for the prohibition of offenses against the city and for other purposes, is discussed at length. Ordinances licensing places of amusement in a municipal corporation are valid as police regulations: *Wallack v. Mayor etc. of New York*, 3 Hun, 87; S. C., 5 T. & C. 314. So ordinances regulating the weight of bread: *Paige v. Fazackerly*, 36 Barb. 394. And ordinances prohibiting the sale of liquor within the corporate limits: *Commonwealth v. Bennett*, 108 Mass. 29. A plenary power is vested in the legislature to create municipal corporations for the purpose of local civil government: *Kinney v. Syracuse*, 30 Barb. 370. And the power to make and enforce ordinances may be conferred on any branch of the municipal government: *People ex rel. Cox v. Special Sessions*, 7 Hun, 216. The case of *Tanner v. Trustees of Albion* is referred to as an authority on the points decided in all the decisions just referred to.

NUISANCE AT COMMON LAW, a noxious trade or business is, without showing any particular injury from it: *Catlin v. Valentine*, 38 Am. Dec. 567, and note. When an act done "is in its own nature an offense, no consequences need be averred in the indictment, but where the act done is not in its own nature an offense, consequences must be stated and proved. The cases to which the law applies the *presumptio juris et de jure*, are fully stated and re-

viewed in the case of *Tanner v. Trustees of Albion*, 5 Hill, 121:" *People v. Carpenter*, 1 Mich. 290. To the point that the game of bowls is an unlawful game, the principal case is cited in *Commonwealth v. Tilton*, 8 Metc. 234. In *Udlike v. Campbell*, 4 E. D. Smith, 575, it is held, following the principal case, that a bowling-alley kept for gain is a nuisance at common law, and therefore, that a contract for the letting of premises for that purpose is void. Woodruff, J., however, while yielding to the authority of the decision, questions its soundness. In delivering the opinion of the court he says: "I do not feel at liberty to regard the question as open for discussion here, though I am by no means satisfied of the correctness of that decision."

BURRITT v. SARATOGA COUNTY MUT. FIRE INS. CO.

[5 HILL, 188.]

REFERENCE IN INSURANCE POLICY TO A SURVEY, APPLICATION, or other paper does not ordinarily make it a part of the contract so as to change representations therein into warranties, but it is otherwise where an application is expressly referred to "as forming a part" of the policy, and the application and policy must be read as one instrument.

CONCEALMENT OF MATERIAL FACTS BY APPLICANT FOR FIRE INSURANCE will not vitiate the policy, it seems, as it would a marine policy, if no inquiry is made as to those facts, but if such inquiry is made the concealment is as fatal to a fire policy as to a marine one.

OMISSION TO MENTION ALL BUILDINGS WITHIN TEN RODS of an insured building, where the conditions annexed to the policy and the printed form of application furnished to the assured require that fact to be stated, is fatal to an action on the policy, especially where the omitted buildings are of a hazardous nature, with respect to danger from fire.

MATERIALITY TO RISK OF FACTS CONCEALED BY AN APPLICANT for fire insurance should be left to the jury if there is doubt on that point.

CONCEALMENT WHICH IS NOT FRAUDULENT WILL AVOID A FIRE POLICY if the conditions annexed to the policy and the form of application require the concealed fact to be stated, and if one of the conditions expressly provides that "any misrepresentation or concealment" will vitiate the policy.

MATERIALITY OF FACT CONCEALED IS NOT OPEN TO DISCUSSION where the conditions annexed to an insurance policy provide that any concealment shall avoid the policy, for concealment in such a case stands upon the same footing as a warranty.

ASSUMPSIT on an insurance policy on the plaintiff's store, which was damaged by a fire communicated to it from a certain cabinet shop standing within ten rods of it. The defense was that the policy was void because the plaintiff omitted in his application to make any mention of the cabinet shop and of certain other buildings within ten rods, though required to do so by the form of application furnished to him and by the conditions of the policy. One condition was that all applications should be made

"according to the printed forms prepared by the company." Other conditions and certain clauses in the policy, material to the controversy, are stated in the opinion. The circuit judge instructed the jury in substance that the representations in the application did not constitute a warranty, and that unless the concealment was fraudulent it did not avoid the policy. Verdict for the plaintiff. Motion for a new trial.

D. Wright and J. A. Spencer, for the defendants

B. Johnson, for the plaintiff.

By Court, BRONSON, J. In the law of insurance, a representation is not a part of the contract, but is collateral to it. An express warranty is always part of the contract, and a reference in the policy to a survey, or other paper, will not make such paper a part of the contract, so as to change what would otherwise be a mere representation into a warranty: *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72 [22 Am. Dec. 567]; *Snyder v. Farmers' Ins. Co.*, 13 Id. 92, and S. C. in error, 16 Id. 481; *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall, 589; 1 Marsh. Ins. (Condy), 346-350, 451; 1 Ph. Ins. 346, 347, ed. of 1840. But these cases admit, what no one could well deny, that the policy may so speak of another writing as to make it a part of the contract, although not actually embodied in the policy. And to that effect, see *Routledge v. Burrell*, 1 H. Bl. 254; *Worsley v. Wood*, 6 T. R. 710; *Roberts v. Chenango Ins. Co.*, 3 Hill, 501. Now here, the policy not only refers to the plaintiff's written application "for a more particular description" of the property insured, but it refers to it "as forming a part of this policy." The application was thus, by express words, made part and parcel of the contract, and the two instruments must be read in the same manner as though they had been actually molded into one.

How, then, stands the question of warranty? The plaintiff was required by the "conditions of insurance," and by the form of application with which he was furnished, to state the "relative situation [of the store] as to other buildings—distance from each, if less than ten rods." To this he answered, by mentioning five buildings as standing within the ten rods. Although he did not in terms say there was no other building within the ten rods, he must have intended that his answer should be received and understood by the company as affirming that fact; and as the answer is to be regarded as parcel of the contract, I find it difficult to resist the conclusion, that the plaintiff has agreed that there were no other buildings within the ten rods

than those mentioned in the application. Men are not at liberty to put a different construction upon their language when the contract is to be enforced, from that in which they intended the words should be received by the other party at the time the contract was made. I am strongly inclined to the opinion that there was a warranty; but there is another feature in the case which renders it unnecessary to settle that question.

In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of mistake, accident, forgetfulness, or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined, or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy: *Bridges v. Hunter*, 1 Mau. & Sel. 15; *Macdowall v. Fraser*, Doug. 260; *Fitzherbert v. Mather*, 1 T. R. 12; *Carter v. Boehm*, 3 Burr. 1905; *Bufe v. Turner*, 6 Taunt. 338; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535 [20 Am. Dec. 547]; *N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. 359; 1 Marsh. Ins. (Condy), 451-453, 465; 1 Ph. Ins. 214, 303. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. But this doctrine can not be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk: See 1 Ph. Ins. 284, 285,

ed. of 1840. It is not necessary for the purpose of avoiding the policy to show that any fraud was intended. It is enough that information material to the risk was required and withheld.

This doctrine is fatal to the present action. The plaintiff was plainly and directly called upon to state the relative situation of the store as to all other buildings within the distance of ten rods; and he omitted to mention several buildings which stood within that distance, and among the number was one which was far more hazardous than that to which the policy applied. If there could be any doubt that the facts concealed were material to the risk, the question should have been left to the jury.

But there is a further view of the case which is still more decisive against the action; and it is one in which the materiality of the concealment is not open for discussion. The plaintiff was required by the conditions annexed to the policy, and by the printed form of application which he used, to give the information which he withheld. And it was one of the "conditions of insurance," that if he should "make any misrepresentation or concealment in the application," the policy should be "void, and of no effect." Nothing is said about fraud; but any concealment in the application avoids the policy. And yet the jury was instructed that there must be a fraudulent concealment of facts. That position can not be maintained without making a new contract for the parties.

A warranty by the assured in relation to the existence of a particular fact, must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material to the risk or not. It would, perhaps, be more proper to say, that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry on the subject: See the cases already cited, and *Fowler v. Aetna Ins. Co.*, 6 Cow. 673 [16 Am. Dec. 460], and S. C., 7 Wend. 270; 1 Ph. Ins. 351, 354. Here the parties have by their contract placed a misrepresentation or concealment, in relation to particular facts, upon the same footing as a warranty. They have agreed that the misrepresentation or concealment shall avoid the policy, and we have nothing to do with the inquiry whether the fact misrepresented or concealed was material to the risk. The jury should have been instructed to find a verdict for the defendants.

The chief justice and COWEN, J., being members of the company, gave no opinion.

New trial granted.

WARRANTY IN INSURANCE POLICY, WHAT CONSTITUTES GENERALLY, and particularly as to fire policies: See *Fowler v. Aetna Ins. Co.*, 16 Am. Dec. 460, and the note thereto, discussing this subject at length and pointing out the difference between warranties and mere representations: *Goicoechea v. Louisiana Ins. Co.*, 17 Id. 175; *Duncan v. Sun Fire Ins. Co.*, 22 Id. 539; *Jefferson Ins. Co. v. Cotheal*, Id. 567; *Farmers' Ins. Co. v. Snyder*, 30 Id. 118; *Wood v. Hartford Fire Ins. Co.*, 35 Id. 92; *Rafferty v. New Brunswick Ins. Co.*, 38 Id. 525, and other cases in this series referred to in the notes to those decisions. As to when a description of the insured property constitutes a warranty, see *Fowler v. Aetna Ins. Co.*, 16 Id. 460, and the note thereto, before referred to. Warranties are generally in the body of the policy, and named or referred to as such: *Clark v. Manufacturers' Ins. Co.*, 2 Woodb. & M. 487. They must appear in the policy, or in a paper attached or referred to therein as part of it, and can not be created by construction: *Mutual Benefit Life Ins. Co. v. Robertson*, 59 Ill. 126. A description in the policy is a warranty: *Wall v. East River Mutual Ins. Co.*, 7 N. Y. 374; *Merwin v. Star Fire Ins. Co.*, 7 Hun, 661. But statements *dehors* the policy are representations only, and not warranties: *Nicoll v. American Ins. Co.*, 3 Woodb. & M. 534. In all these cases *Burritt v. Saratoga etc. Ins. Co.* is cited as an approved authority.

REFERENCE IN POLICY TO APPLICATION, SURVEY, OR PROPOSALS OR CONDITIONS, constitutes representation therein warranties, when: See *Duncan v. Sun Fire Ins. Co.*, 22 Am. Dec. 539; *Jefferson Ins. Co. v. Cotheal*, Id. 567; *Farmers' Ins. Co. v. Snyder*, 30 Id. 118; *Wood v. Hartford Fire Ins. Co.*, 35 Id. 92, and the notes thereto referring to other cases. To the point that where the application, survey, conditions of insurance, or other collateral writings are referred to in the policy as forming a part of it, they become a part of the contract and their representations are constituted warranties, the principal case is cited as authority in *Sexton v. Montgomery Co. Mut. Ins. Co.*, 9 Barb. 200; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Id. 286; *Smith v. Empire Ins. Co.*, 25 Id. 503; *Shoemaker v. Glens Falls Ins. Co.*, 60 Id. 101; *Egan v. Mutual Ins. Co. of Albany*, 5 Denio, 327; *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 378; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 Id. 520; *Owens v. Holland Purchase Ins. Co.*, 56 Id. 570; *Cushman v. United States Life Ins. Co.*, 63 Id. 407; *Taylor v. Aetna Ins. Co.*, 120 Mass. 256. But where a policy, after describing the property, contained the clause, "Reference being had to the application of said J. & T. Trench for a more particular description, and the conditions annexed, as forming a part of this policy," it was held that the conditions were made a part of the policy, but that the application was not, being referred to merely for the purpose of aiding the description: *Trench v. Chenango Mut. Ins. Co.*, 7 Hill, 124. Where the conditions annexed and referred to as forming a part of the policy provide that any misstatement or concealment as to the applicant's title shall render the policy void, the statement of the title is a warranty; if the title is incorrectly stated, it precludes all inquiry as to whether there was any insurable interest, and as to the thing warranted being material: *Birmingham v. Empire Ins. Co.*, 42 Barb. 459.

WARRANTY IN POLICY MUST BE STRICTLY KEPT, whether the fact warranted would otherwise be material or not, or the policy will be void, such warranty being in the nature of a condition precedent: *Fowler v. Aetna Ins. Co.*, 16 Am. Dec. 460, and note; *Goicoechea v. Louisiana Ins. Co.*, 17 Id. 175; *Duncan v. Sun Fire Ins. Co.*, 22 Id. 539; *Farmers' Ins. Co. v. Snyder*, 30 Id. 118. A warranty is a condition precedent, and if not strictly kept, the policy does

not take effect: *Mutual Benefit Life Ins. Co. v. Robertson*, 59 Ill. 126, citing the principal case.

CONCEALMENT OF MATERIAL FACT BY ASSURED, EFFECT OF: See *Stoney v. Union Ins. Co.*, 15 Am. Dec. 634; *Fowler v. Aetna Ins. Co.*, 16 Id. 460; *Curry v. Commonwealth Ins. Co.*, 20 Id. 647; *Walden v. Louisiana Ins. Co.*, 32 Id. 116, and note. As to when an omission to mention the distance to a neighboring building, in answer to an inquiry on that point, will not be deemed fatal, see *Dennison v. Thomaston Mut. Ins. Co.*, 37 Id. 42. In *Gates v. Madison Co. Mut. Ins. Co.*, 3 Barb. 78, where in the application which was made a part of the policy the applicant was asked to state "distance from other buildings, if less than ten rods," to which he replied by mentioning the nearest buildings, omitting to mention other buildings within ten rods, this was held to be a concealment of a fact material to the risk, and therefore fatal to the policy, following the principal case. But in the same case in the court of appeals it was held that this was no warranty that there were no other buildings within ten rods, and that the omission did not avoid the policy unless it were shown to the satisfaction of the jury that the fact was material to the risk, and the principal case was commented on and distinguished on the ground that there the applicant was expressly called upon to state the distance to each of the buildings within ten rods: *Gates v. Madison Co. Mutual Ins. Co.*, 2 N. Y. 48; S. C., 5 Id. 473. See also *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. 633, distinguishing the case last cited from the principal case. In that case also it was held that a mention of the nearest buildings within ten rods was not a warranty that there were no others, and that the omission to mention others was not fatal unless material, especially where the agent of the insurers knew of the existence of the other buildings. In *Wilson v. Herkimer Co. Mut. Ins. Co.*, 6 N. Y. 59, the inquiry was in the same form as in the principal case, and there was a similar omission, and it was held fatal, although the insurance there was not on the building, but on the goods contained in it. In *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 376, also, the interrogatory in the application forming part of the policy was substantially the same, and the application concluded with the statement: "All of the exposures within ten rods are mentioned." This was held a warranty that there were no buildings within ten rods other than those mentioned. In *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. 539, an omission to mention a kitchen part attached to an insured building, the distance to adjacent buildings being called for, was held not to be fatal unless material, which the referee found not to be the fact, and *Burrill v. Saratoga etc. Ins. Co.* was said not to be in point.

Where the conditions of insurance referred to as forming part of a policy require a statement of all incumbrances on the property, and make him responsible for the truth of such statement, if the applicant, in answer to an interrogatory on that point, says that there are no incumbrances when there are, the policy is void: *Owen v. Farmers' Joint Stock Ins. Co.*, 57 Barb. 524, citing the principal case. That the doctrine of marine insurance, that a policy is vitiated by any concealment by an applicant for insurance of a fact within his knowledge affecting the risk, whether there is an inquiry on that point, does not apply in its full extent to a fire policy, is held, citing the principal case, in *People v. Liverpool etc. Ins. Co.*, 2 T. & C. 271; *Clark v. Manufacturers' Ins. Co.*, 8 How. (U. S.) 249. But the withholding of any material fact, which the assured is called upon to state, is fatal, even though such concealment or omission is not fraudulent, but occurs through accident or mistake: *Howes v. Lawrence*, 4 N. Y. 348; *Mutual Life Ins. Co. v. Wager*, 27 Barb. 364; *Clark v*

Manufacturers' Ins. Co., 2 Woodb. & M. 489. So even though the fact omitted or concealed is not material to the risk, if it is material to the question whether the insurer will insure at all or not: *Ritt v. Washington Marine and Fire Ins. Co.*, 41 Barb. 358.

MISREPRESENTATIONS BY ASSURED, effect of generally, but particularly with respect to fire policies: See *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 507; *Curry v. Commonwealth Ins. Co.*, Id. 547; *Jefferson Ins. Co. v. Cotheal*, 22 Id. 567; *Currell v. Mississippi Ins. Co.*, 29 Id. 439; *Farmers' Ins. Co. v. Snyder*, 30 Id. 118; *Ætna Ins. Co. v. Tyler*, Id. 90; *Rafferty v. New Brunswick Ins. Co.*, 38 Id. 525, and the note to *Fowler v. Ætna Ins. Co.*, 16 Id. 462 *et seq.*

MATERIALITY OF FACTS CONCEALED OR MISREPRESENTED by the assured is for the jury: *Firemen's Ins. Co. v. Walden*, 7 Am. Dec. 340; *Farmers' Ins. Co. v. Snyder*, 30 Id. 118. Every fact or circumstance which can possibly influence the mind of a prudent and intelligent insurer is material: *Himely v. South Carolina Ins. Co.*, 12 Id. 623. That the materiality of a fact is for the jury in such cases, is held, citing the principal case, in *Gates v. Madison Co. Mut. Ins. Co.*, 2 N. Y. 48. So of the materiality of an alteration of the insured premises: *Murdock v. Chenango Co. Mut. Ins. Co.*, Id. 220. And in case of a reference the question of materiality is for the referee: *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. 539.

WILLIS v. GREEN.

[5 HILL, 232.]

NOTICE TO ONE OF TWO JOINT INDORSERS, NOT PARTNERS, of the dishonor of the note indorsed by them, is not sufficient to charge either.

SURVIVOR OF TWO JOINT INDORSERS TAKING SECURITY from the maker of the note, upon being called on for payment, after dishonor, by a bond and warrant of attorney given to secure that and other demands which he has against the maker, and afterwards collecting nearly the entire amount thereon, admits due notice to himself and his co-indorser so as to render him liable to the holder.

ASSUMPSIT on a promissory note made by one Pinney, promising "to pay to John R. Willis [now plaintiff], to the order of Smith Johnson and Lester Green [the defendants]," the sum of four hundred and fifty dollars, and indorsed by the said Johnson and Green. Johnson died intestate before the maturity of the note, and no administrator had then been appointed. It was proved that notice for each of the indorsers was sent by mail to each, directed to Little Falls; but it appeared that Johnson, before his death, resided in Salisbury, where there was a post-office. After the dishonor, the note was put in an attorney's hands for collection, and he applied to Pinney and also to the defendant for payment, and they went to the attorney's office, and Pinney executed a bond and warrant of attorney to the

defendant to secure said note and other demands of the defendant against Pinney, upon which judgment was subsequently entered, and the defendant had collected all but about one hundred and seventy dollars of the amount. Verdict for the plaintiff, by consent, subject to the opinion of the court as to his right to recover. The ground upon which a recovery was resisted sufficiently appears from the opinion.

C. P. Kirkland, for the plaintiff.

J. A. Spencer, for the defendant.

By Court, NELSON, C. J. It has already been decided in this case that the suit was properly brought in the name of the plaintiff, as Johnson and Green were the payees of the note, and the legal title properly derivable through them by the indorsement: *Willis v. Green*, 10 Wend. 516.

If notice of protest be material to charge Green as co-payee and indorser, it is equally important that it should be brought home to Johnson before either can be made liable. They were not partners, and therefore notice to one will not answer. It was once supposed, in a like case, that the indorsers were partners *quoad* the particular transaction: *Carvick v. Vickery*, 2 Doug. 653, n.; but that doctrine was repudiated when the case afterwards came on for trial before Lord Mansfield: *Id.* 654. It has ever since been the settled commercial rule that co-payees, not partners, must each indorse in order to negotiate the paper: *Chit. on Bills*, 66, 67, 254, ed. of 1840. It would seem consistently, if not necessarily, to follow from this doctrine, that their interests, though joint as to the remedies against them on the paper, are so far distinct and separate as it respects each other, that notice of the default of the maker should be given to both. In the ordinary case of a partnership, the interest is not only joint, but each member is a general agent of the concern; and hence notice to one is notice to all. But here no such agency exists, as is sufficiently shown from the fact that each party must act for himself in the negotiation of the note.

I do not see but the case of joint indorsers, not partners, stands on the same footing as that of joint makers of a note who are not partners; and in respect to them it is settled that presentment must be made to each, in order to charge the indorser. The argument is about as strong, both upon reason and analogy, in favor of giving effect to a demand upon one of the co-makers, as it is in favor of giving effect to a notice to one of the co-indorsers. The question has been very fully and satisfac-

torily examined by the supreme court of errors in Connecticut, and a decision made in conformity with these views: *Shepherd v. Hawley*, 1 Conn. 367 [6 Am. Dec. 244].

The plaintiff failed to show that the estate of Johnson had been charged by notice of non-payment. If the notice relied on for that purpose had been sent to the proper place, no doubt it would have been sufficient, under the circumstances of this case, though directed to Johnson after his death: *Stewart v. Eden*, 2 Cai. 121 [2 Am. Dec. 222]; *The Merchants' Bank v. Birch*, 17 Johns. 25 [8 Am. Dec. 367]. But the notice was sent to Little Falls, instead of Salisbury where Johnson resided; and if there were nothing else in the case, I think the failure to charge the estate by due notice would operate a discharge of both indorsers. It clearly would if both were living, as a joint action could not, in such case, be sustained upon the note. And although the remedy at law survives against Green alone, yet as he is entitled to contribution from the estate of his co-indorser, it seems to me equally obligatory upon the holder to prove that both were charged, or rather that the estate of the deceased was charged, so as to secure the remedy over. Otherwise, the whole debt would fall upon the survivor. The question, however, is not without its difficulties, and it is unnecessary now to decide it.

I think enough was shown, within the doctrine of the case of *Tebbetts v. Dowd*, 23 Wend. 379, to establish the fact as against the defendant, that all the necessary steps had been taken by the holder to charge both indorsers. After the note fell due and had been placed in the hands of an attorney for collection, on being called upon for payment, the maker gave Green security for his liability upon this very note, and he has since collected a part of the money thus secured to be paid, thereby fully admitting his liability, and consequently that the proper steps had been taken to charge him as indorser. The moneys received by Green may not be quite sufficient to cover the whole amount of the note in question and the other liabilities for which security was taken; but unless he was duly charged, why take security at all as respects the note, and follow it up by receiving a considerable sum applicable to it? The money realized upon the security falls short only some one hundred and seventy dollars of covering the whole amount of the liabilities for which it was given, including the note. The case of *Gunson v. Mets*, 1 Barn. & Cress. 193, is a strong authority upon this point. That was a suit by the indorsee against the drawer of a bill of ex-

change. No notice of dishonor was proved, but, to supply the defect, the plaintiff proved that, after the bill fell due, the drawer entered into an agreement with one Kinnear, a prior indorsee, by which, after reciting that the drawer had indorsed and drawn various bills of exchange (one of them being the bill in question), which were then overdue, and which were or ought to be in the hands of Kinnear, it was agreed by the latter that he would receive the moneys due upon said bills in weekly installments, etc. Abbott, C. J., held, that the recital in the agreement was an acknowledgment by the defendant that he was in such a situation as to be liable to pay the bill, and consequently that he had received notice of dishonor. This decision was afterwards confirmed by the king's bench. In the case in hand the defendant admitted his liability, took security from the maker to indemnify him, and has actually realized thereon most of the money which he now refuses to apply.

Judgment for the plaintiff.

NOTICE TO JOINT INDORSERS, NOT PARTNERS, must be given to each of them: *Shepard v. Hawley*, 6 Am. Dec. 244. So held, citing *Willis v. Green*, in *Beals v. Peck*, 12 Barb. 251; *Cayuga Co. Bank v. Warden*, 1 N. Y. 418; *Lewis v. Woodworth*, 2 Id. 512; *Hubbard v. Matthews*, 54 Id. 50; *Union Bank v. Willis*, 8 Metc. 512. So demand must be made upon both, if not partners; but if they are partners, a demand on one, even after the bankruptcy of the firm, binds both: *Gates v. Beecher*, 60 N. Y. 523. And admissions by one of two joint indorsers not partners, do not bind the other: *Lewis v. Woodworth*, 2 Id. 512. Similarly, one tenant in common, it is held, can not bind his cotenants by his acts or admissions: *Pearis v. Covilland*, 6 Cal. 621.

WAIVER OF NOTICE BY TAKING SECURITY from maker of note: See *Kramer v. Sandford*, 39 Am. Dec. 92, and the note thereto discussing this subject at length. Where an indorser of a note assented to an indorsement thereon, after its maturity, of a certain sum as a payment which was due himself from one of the holders, with knowledge that it had not been presented to the maker for payment, it was held a waiver of such presentment: *Buckley v. Bentley*, 42 Barb. 650, citing the principal case.

HARTFORD AND NEW HAVEN R. R. CO. v. CROSWELL.

[5 HILL, 283.]

SUBSCRIBER TO STOCK OF RAILWAY CORPORATION WHOSE CHARTER IS AMENDED after his subscription and without his consent, by superadding to the original object of the incorporation an authority to establish a line of water communication, in connection with the railroad, involving large additional expense, and to increase the capital stock for that purpose, is not liable for his subscription, although such amendment is accepted by the board of directors and also by a majority of the stockholders.

ASSUMPSIT to recover certain unpaid installments of the defendant's subscription to the stock of the plaintiffs' company. It appeared that in 1839, after the installments now sued for were due, the charter of the corporation was amended by the legislature of Connecticut, so as to authorize said corporation to procure, charter, or purchase and hold a number of steamboats, to be used in connection with their road, at an expense not to exceed two hundred thousand dollars, and for that purpose to increase their capital stock. This amendment was accepted by the board of directors, and also by a meeting of stockholders, at which the defendant was not present. There was no evidence that the defendant had ever assented to the amendment, and he refused to pay his subscription. Verdict for the plaintiffs, subject to the opinion of this court.

S. P. Staples, for the plaintiffs.

O. McVean, for the defendant.

By Court, NELSON, C. J. The main objection taken to a recovery in this case is, that the plaintiffs are seeking to enforce the performance of a different contract from that into which the defendant entered when he subscribed for the stock; in other words, that the defendant never assented to the contract upon which the action is founded. The original charter conferred upon the company all the usual and necessary powers for locating and constructing a railroad from the town of Hartford to the city of New Haven. The ten shares subscribed for by the defendant were expressly taken upon "the terms, conditions, and limitations" mentioned in the charter. And such would doubtless have been the legal effect of the subscription had no reference to the charter been made in it. The contract thus entered into was as specific and definite as the charter of the company could make it; and the meaning and intent of the parties can not therefore be mistaken. It was a contract to take stock in an association incorporated for a particular object, having such limited and well defined powers as were necessary to the accomplishment of that object. The defendant assented to the object by his subscription, and thereby agreed that his interest should be subject to the direction and control of the powers thus expressly conferred, but nothing more. Since entering into this contract, the plaintiffs have procured an amendment of their charter, by which they have superadded to their original undertaking, a new and very different enterprise—and, for aught that can be known, a very hazardous one—with

the necessary additional powers to carry it into effect. Instead of confining their operations to the construction and management of their railroad between Hartford and New Haven, they have undertaken to establish and maintain a line of water communication by means of steamboats, at an expense not to exceed two hundred thousand dollars; to all which, it is insisted, the contract of the defendant has become subject, without his approbation or assent.

It is most obvious, if incorporated companies can succeed in establishing this sort of absolute control over the original contract entered into with them by the several corporators, there is no limit to which it may not be carried short of that which defines the boundary of legislative authority. The proposition is too monstrous to be entertained for a moment. Corporations possess no such power. Indeed they can exercise no powers over the corporators beyond those conferred by the charter to which they have subscribed, except on the condition of their agreement or consent. This is so in the case of private associations, where the articles entered into and subscribed by the members are regarded as the fundamental law or constitution of the society, which can only be changed by the unanimous voice of the stockholders: *Livingston v. Lynch*, 4 Johns. Ch. 573; Coll. Part. 641. So here, the original charter is the fundamental law of the association—the constitution which prescribes limits to the directors, officers, and agents of the company not only, but to the action of the corporate body itself—and no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished or responsibilities incurred by the company, so as to bind the individuals composing it, without their assent.

The question has been the subject of consideration in Massachusetts and Pennsylvania, and in each the courts have not hesitated to maintain the inviolability of the contract as originally entered into, denying to the company the power of altering it essentially, and of binding the subscribers who have not given their assent. In the case of *The Middlesex Turnpike Corporation v. Locke*, 8 Mass. 268, the suit was brought upon a subscription contract for stock, by which the defendant agreed to take one share, and to pay all assessments made upon it. The ground of defense which prevailed was, that the location of the turnpike road had been changed by an act of the legislature, after the defendant's subscription, the act having been passed at the instance of the corporation; and that the defendant had

never assented to the alteration. The court said: "The plaintiffs rely on an express contract, and were bound to prove it as they allege it. Here the proof is of an engagement to pay assessments for making a turnpike in a certain specified direction. The defendant may truly say, *non hæc in fœdera veni*. He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto." The same principle was recognized and admitted in the case of *The Indiana & Ebensburg Turnpike Co. v. Phillips*, 2 Penn. 184. I do not deny that alterations may be made in the charter by the procurement of the company, without changing the contract so essentially as to absolve the subscriber. Such would be the case, perhaps, in respect to mere formal amendments, or those which are clearly enough beneficial, or at least not prejudicial to his interests. A modification of the grant may frequently be advisable, if not necessary, in order to facilitate the execution of the very object for which the company was originally established; and I admit there are intrinsic difficulties in the way of laying down any general rules by which to distinguish between the two kinds of cases. Each must depend upon its own circumstances, and be disposed of with due regard to the inviolability belonging to all private contracts.

Some of the cases which have occurred exemplify the difficulties attending the question. In *Irvin v. The Turnpike Co.*, 2 Penn. 466 [23 Am. Dec. 53], it was held that a benefit which results to individual property by the location of the road, did not, in contemplation of law, enter into the consideration of the contract of subscription. Hence, it was there decided that the subscriber was bound, notwithstanding a change in the location of the road, made by an act of the legislature, against his remonstrance; and this though the change was obviously to his prejudice, in point of fact. The decision, it will be perceived, is contrary to the case before referred to in Massachusetts. The court, moreover, were not unanimous, Rogers and Kennedy, JJ., having dissented. In *Gray v. The Monongahela Navigation Co.*, 2 Watts & S. 156 [37 Am. Dec. 500], the same learned court held, that an alteration in the charter, by which additional privileges were granted to the corporation, was not such a violation of the contract of subscription as would relieve the subscriber, although the additional privileges might extend the liabilities of the company, and thus incidentally affect him.

I refer to the last two cases as affording a very full and able

examination of the subject, without intending, at this time, to assent to their conclusions or to all the reasonings of the learned chief justice who delivered the opinions. In each of them, however, the general principle before asserted in *The Indiana and Ebensb. Turnpike Co. v. Phillips*, is recognized, viz., that the alteration by the legislature may be so extensive and radical as to work a dissolution of the contract; but an effort is made so to modify and regulate the application of the principle as to admit of improvements in the charter, useful to the public and beneficial to the company, without this consequence.

In the case before us, the change in the powers and purposes of the plaintiffs' company has been so extensive as to preclude us from sanctioning a recovery upon the defendant's subscription, unless we are prepared entirely to abandon the principle above stated and to declare that the interests of subscribers shall be subject to the will and pleasure of a majority of the stockholders.

Judgment for the defendant.

LIABILITY OF STOCKHOLDER ON SUBSCRIPTION FOR STOCK: See *Andover Turnpike Corp. v. Gould*, 4 Am. Dec. 80; *Worcester Turnpike Corp. v. Willard*, Id. 39; *New Bedford Turnpike Corp. v. Adams*, 5 Id. 81; *Instone v. Frankfort Bridge Co.*, Id. 638; *Taunton Turnpike v. Whiting*, 6 Id. 124; *Goshen Turnpike v. Hurin*, Id. 273; *Middlesex Turnpike v. Swan*, Id. 139; *Dutchess Cotton Mfy. v. Davis*, 7 Id. 459; *Union Locks v. Towne*, 8 Id. 32; *Chester Glass Co. v. Dewey*, Id. 128; *Franklin Glass Co. v. Alexander*, 9 Id. 92, and the note thereto discussing this subject in its various phases; *Hagerstown Turnpike Road v. Creeger*, Id. 495; *Hibernia Turnpike Corp. v. Henderson*, 11 Id. 593, and note; *Bend v. Susquehanna Bridge Co.*, 14 Id. 261; *Irvin v. Turnpike Co.*, 23 Id. 53. In *Northern R. R. Co. v. Miller*, 10 Barb. 268, it is held that subscriptions for stock, like that in the principal case, are express promises to pay for the shares subscribed. In *Fort Edward etc. Plank R. Co. v. Payne*, 17 Id. 574, it is said that the question as to whether an express promise to pay assessments on stock is necessary to support an action therefor was not raised in *Hartford etc. R. R. Co. v. Croswell*.

STOCKHOLDER'S LIABILITY ON SUBSCRIPTION, HOW AFFECTED BY AMENDMENT OF CHARTER: See *Union Locks v. Towne*, 8 Am. Dec. 32; *Irvin v. Turnpike Co.*, 23 Id. 53; *Milford etc. Co. v. Brush*, 36 Id. 78, and note. The doctrine laid down in the principal case, that a subscriber for stock in a corporation is not bound by a subsequent amendment of its charter, without his consent, radically changing the purpose of the incorporation by adding new enterprises, or the like, and is thereby released from his subscription, is approved in *McCullough v. Moss*, 5 Denio, 580, and *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 606. The charter is the fundamental law of the corporation and of the subscriber's contract: *Abbot v. American Hard Rubber Co.*, 21 How. Pr. 200. If the legislature can not change the contract without the subscriber's assent, much less can the directors, or executive committee, or stockholders of the corporation do so by radically changing the business of the corporation, as by selling the

entire property of the corporation: *Id.*; S. C., 20 *Id.* 204; 11 *Abb. Pr.* 208; 33 *Barb.* 584; or by an exchange of its assets, on dissolution, for stock in another company: *Frothingham v. Barney*, 6 *Hun.* 366; or by consolidating the corporation with another to form a new corporation: *Blatchford v. Ross*, 5 *Abb. Pr.* (N. S.) 437; S. C., 37 *How. Pr.* 113; 54 *Barb.* 46; *Clearwater v. Meredith*, 1 *Wall.* 40; or, in case of a railroad company, by departing from the route marked out in its charter: *Buffalo etc. R. R. Co. v. Pottle*, 23 *Barb.* 23; or by extending the road and increasing the capital stock, without complying with the provisions of the charter on that point: *Macedon etc. Plank R. Co. v. Lapham*, 18 *Barb.* 315. But a mere cessation of work on the road, within a very short distance of the terminus marked out in the articles of incorporation, where the articles are not changed and there is no resolution of the directors, providing for a termination of the road at the point where the work is stopped, is not such a change as to work a release of the subscription of a non-assenting stockholder, the doctrine of the principal case not being applicable to such a state of facts: *Buffalo etc. R. R. Co. v. Clark*, 22 *Hun.* 366. For it is not every unimportant change which will dissolve the contract: *Clearwater v. Meredith*, 1 *Wall.* 40.

Where the legislature reserves the power to amend the charter of a corporation, an alteration made and accepted by the proper authority of the corporation is binding on those stockholders who do not assent thereto, and they are not released from their subscriptions: *Northern R. R. Co. v. Miller*, 10 *Barb.* 260, 273, 278, 283; as where, after such reservation, an amendment is adopted providing for new and additional enterprises: *White v. Syracuse etc. R. R. Co.*, 14 *Id.* 561; or reducing the capital stock: *Joslyn v. Pacific Mail Steamship Co.*, 12 *Abb. Pr.* (N. S.) 334. So where a plank road company is empowered to construct a branch road: *Schenectady etc. Plank R. Co. v. Thatcher*, 11 *N. Y.* 109; all distinguishing the principal case. So where the charter is so amended as to change the name of the corporation, to increase its capital stock, and to authorize an extension of its road: *Buffalo etc. R. R. Co. v. Dudley*, 14 *Id.* 336. In that case, after referring to the change of name, Selden, J., says: "In other respects the change in this case is not materially greater than in that of *Schenectady etc. P. R. Co. v. Thatcher*, 11 *Id.* 102. It does not become necessary, therefore, to take into consideration the soundness of the principles advanced in the case of *Hartford etc. R. R. Co. v. Crosswell*, 5 *Hill.* 383. That case is in direct conflict with several English cases, as well as with some decided in this country; and a portion of its reasoning would, I think, require to be examined with some care before it is finally adopted: *Midland Railway Co. v. Gordon*, 16 *Mee. & W.* 803; *Stevens v. South Devon Railway Co.*, 13 *Beav.* 48; *Fyooks v. London etc. Railway Co.*, 19 *Eng. L. and Eq.* 7; *Irvin v. Turnpike Co.*, 2 *Penn.* 466 [23 *Am. Dec.* 53]; *Gray v. Monongahela Navigation Co.*, 2 *Watts & S.* 156 [37 *Am. Dec.* 500]." But although the executive committee of a corporation is authorized to amend the articles of incorporation by a two-thirds vote, if the original articles forbid consolidation with any other corporation, it seems that the executive committee can not change them so as to authorize such consolidation, and thereby bind a non-assenting stockholder: *Blatchford v. Ross*, 5 *Abb. Pr.* (N. S.) 437; S. C., 37 *How. Pr.* 113; 54 *Barb.* 46.

LILLIE v. HOYT.

[5 HILL, 295.]

COLLECTING AGENT IS LIABLE TO ACTION WITHOUT DEMAND for moneys collected for his principal and not paid over.

QUESTION AS TO QUANTUM OF DAMAGES CAN NOT BE RAISED BY MOTION FOR NONSUIT so as to bring it up on error, if the plaintiff is entitled at least to nominal damages.

ASSUMPSIT for money had and received. The action was brought to recover certain money, alleged to have been collected by the defendant as agent for the plaintiffs. It appeared that the money was collected in bills of a certain bank which had suspended specie payment. In a letter to the plaintiffs shortly after the collection, the defendant said he had tried to purchase cotton with the bills, and as soon as anything could be done, would remit the proceeds, but that the bills would not then net more than sixty-five cents on the dollar in New York. The defendant retained the bills and tendered them on the trial. A motion for a nonsuit, because no demand before action brought was proved, and because the value of the bills was not proved, was overruled. Verdict and judgment for the plaintiffs for an amount equal to about sixty-five per cent. of the face of the bills, and the defendant brought error.

H. F. Clark, for the plaintiff in error.

A. P. Man, contra.

By Court, COWEN, J. The only question made on the trial which can be reviewed on this writ of error is, whether a collecting agent, having received the moneys of his principal, be liable to an action without a previous request to pay. The progress of the question in this court, or rather of questions now thought to bear upon it, has been as follows: In *Ferris v. Paris*, 10 Johns. 285, a foreign factor was held not to be liable for the proceeds of sales till he should first be directed how to remit, and refuse to comply. The case was somewhat special in its circumstances, and appears to have been considered without reference to a single book or a recurrence to any general principle. It is scarcely an authority for the rule that a demand must in general be made even upon a factor, much less an agent of any other character. Then came *Taylor v. Bates*, 5 Cow. 376, 379, which went somewhat upon its analogy to *Ferris v. Paris*. It was there held that an attorney at law was not liable to an action for moneys collected, till demand made. The circum-

stances of that case too were somewhat special. The attorney resided in Vermont, and collected for clients in this state. He had moreover made an effort to find where he should pay the money, the attorneys in fact for the plaintiff having refused to receive it. The next case is *Rathbun v. Ingals*, 7 Wend. 320, another special case. The defendant could hardly be said to have been a receiver of the funds till about the time when the plaintiff absconded, and he had not afterwards returned and showed himself publicly. Sutherland, J., considered *Taylor v. Bates* as an authority that an attorney at law is not in general liable till demand made or direction given to remit. On the contrary, in *Stafford v. Richardson*, 15 Wend. 302, the statute of limitations was held to run in favor of the attorney, though no demand had been made. *Taylor v. Bates* was there spoken of as a special case. *Ex parte Ferguson*, 6 Cow. 596, was a motion to attach an attorney, and furnishes no guide in respect to an action.

The utmost that our own cases establish is, that a foreign factor and an attorney at law are not liable till request, though, on our latest decision, I should hardly think this predicable of an attorney. If the rule be general, it should work both ways. If the attorney is to be protected till demand, it follows that he ought not to be allowed the benefit of the statute running till a demand is made. The reason is quite as strong in favor of sheriffs; yet an action lies for moneys collected by them without demand: *Dale v. Birch*, 3 Camp. 347. If officers of the court be vexatiously pursued, the courts are competent to relieve on motion; and this is the only remedy for the sheriff, a man more constantly engaged in receiving and disbursing than the attorney: *Id.*; *Jefferies v. Sheppard*, 3 Barn. & Ald. 696. Be all this as it may, however, and though it be proper to protect an officer of the court against the possibility of vexation, by requiring a demand; or a factor, who, it seems, is so protected in a measure as well by the English rule as our own: *Topham v. Braddick*, 1 Taunt. 572; yet I apprehend there is no general rule in the law requiring so much as to other agents. Money received by an agent is received for the use of his principal; and on this ground the sheriff was held liable by Lord Ellenborough, C. J., in *Dale v. Birch*. The general rule seems to be correctly laid down in *Buckner v. Patterson*, Litt. Sel. Cas. 234. The money had there been paid to the defendant in order that he should pay it over to the plaintiff. On an action brought, the question was raised whether it was due before being demanded. Logan, J., said: "The money being paid to the de-

fendant for Buckner, created in law an implied promise on the part of the defendant, in favor of Buckner, which rendered him liable immediately to the plaintiff for that sum." A demand was therefore held to be unnecessary. The case of *Coomer v. Little*, Cam. & N. 92; Taylor's N. C. Conf. 223, is still more directly in point. There the defendant received money as the agent of the plaintiff, on an army certificate. The court held that an action lay immediately. Sergeant Williams, in *Birks v. Trippet*, 1 Saund. 83, note 2, says that where the money is due and payable immediately, no demand is necessary; and the rule is general that where the action is for a precedent debt or duty, a demand need not be proved: 1 Chit. Pl. 329, Am. ed. of 1840. The duty of a collecting agent is not merely to receive, but to pay over the money; and it seems to me more important that he should be holden to do so without request, than in the case of an ordinary debtor for money lent. There the creditor knows what to demand; he is generally ignorant that his agent has collected the money. Where one engages to pay an ordinary debt, even though he provide that this shall be on demand, yet bringing a suit is a sufficient demand. This was held of the plaintiff's money, received to keep for him and to be restored on demand: *Darnall's Executors v. Magruder*, 1 Har. & G. 439. The duty of a collecting agent to seek his principal and pay the money he has collected, was never doubted in Westminster Hall.

In *Nickolson v. Knowles*, 5 Madd. 47, the vice-chancellor said the agent's duty was to pay the money over to the principal, and he would not allow the agent to contest the principal's right, on the ground that another claimed or even had a right to the money. The form of the action furnishes a test. It is *indebitatus assumpsit* for money had and received: Paley on Agency, 57. This action proceeds on an implied promise arising from a precedent debt; and though the declaration state it as a promise to pay on demand, the defendant may plead *non assumpsit* within six years. He is not put to say the action did not accrue within six years from the time of demand: *Collins v. Benning*, 12 Mod. 444. I venture to affirm that the only exception to be found in the law, unless a licensed attorney be one, is that of a factor who is sued not simply for omitting to pay over moneys, but on his implied promise to account. Such was *Topham v. Bradick*, before cited. In that case, no request to account being shown, the statute of limitations was held not to run. The case was put on the special ground that the promise was to sell goods going to a distant country, and that the transaction would perhaps require

a considerable time for its completion. The contract between the merchant and his factor raises no immediate duty against which the statute of limitations can run. It looks to a distant day for performance; and from the very nature of it imposes no obligation to pay over moneys until an account is given. It was strong, perhaps, to say that the factor need not even account without request, after the transaction is closed; and the contrary seems to have been taken for granted in *Varden v. Parker*, 2 Esp. 710. But the reason of applying the rule to any extent in this more complicated commercial relation, ceases altogether when we come to the simple duty of a collecting agency. As to this, whatever money is received, be it part or the whole, it must be paid over within a reasonable time, without waiting for a demand. The objection that the defendant had not received money, but property in payment, and therefore the action for money had and received is inappropriate, does not appear to have been taken at the trial.

The third point taken by the plaintiff in error, relates merely to the amount of damages. Though it might have been a proper point for consideration on moving for a new trial, it is not so on writ of error. It was clearly no ground of nonsuit that the plaintiff had not proved the value of the bills received by the defendant; for without that the plaintiff was entitled to recover something. The point not having been made except on the motion for a nonsuit, is not brought up in such a way that we can consider it in reference to the amount of damages. To make it available in that view, instructions should have been asked against anything more than nominal damages. On the court below refusing to charge accordingly, the point might have been raised by exception.

On the whole, I am of opinion that the judgment should be affirmed.

Judgment affirmed.

AGENT OR FACTOR IS NOT LIABLE, WITHOUT PREVIOUS DEMAND for an account or payment, for the proceeds of goods sold by him on commission: *Judah v. Dyott*, 25 Am. Dec. 112. The principal case is cited to the point that a mere collecting agent is liable for money collected and not paid over, without any previous demand, in *Schroepfel v. Corning*, 6 N. Y. 117; *Hickok v. Hickok*, 13 Barb. 633; *Albany City Fire Ins. Co. v. Devendorf*, 43 Id. 446. So also a sheriff who has collected money on execution which he has not paid over is held liable without a demand: *Nelson v. Kerr*, 2 Thomp. & C. 301. But a factor is not liable without a demand, for the proceeds of goods sold by him: *Baird v. Walker*, 12 Barb. 301; *Walden v. Crafts*, 2 Abb. Pr. 304; S. C., 4 E. D. Smith, 496; *Colein v. Holbrook*, 2 N. Y. 130, citing the principal

case. In *Renwick v. Renwick*, 1 Brad. 239, *Schroeppel v. Corning*, 5 Denio, 252, and *Reitz v. Reitz*, 14 Hun, 537, the case is cited to the point that as an agency is not a technical trust, and that as an agent is liable for money collected without a demand, the statute of limitations runs in his favor from the time of receiving the money.

DEMAND BEFORE SUIT, NECESSITY OF, IN GENERAL: See *Nelson v. Bostwick*, ante, 310, and cases cited in the note thereto.

CARVILLE v. CRANE.

[5 HILL, 463.]

STATUTE OF FRAUDS APPLIES TO PAROL PROMISE TO INDORSE NOTE for a purchaser of goods in consideration that the vendor will sell to him, and no action will lie on such promise.

STATUTE OF FRAUDS SHOULD BE LIBERALLY CONSTRUED.

ACTION on a promise to indorse a note for certain parties. The promise declared on, as stated in the declaration, appears from the opinion. Demurrer, on the ground that the promise was void by the statute of frauds.

H. B. Cowles, for the defendant.

A. Underhill, for the plaintiff.

By Court, COWEN, J. The declaration states a contract (which it avers was not in writing) by which the defendant, in consideration that the plaintiff at the defendant's request would sell and deliver a bill of goods amounting to two hundred and fifty-one dollars and sixty-four cents, to the firm of G. B. & J. L. Crane, undertook that he would indorse their note at six months for the price. The legal effect of the contract, if valid, was to bind the defendant to indorse instantly on the sale of the goods. The question is, whether this be a promise to answer for the debt or default of another, within the meaning of the statute of frauds. The consideration moved to the firm, which was the principal debtor; and if the defendant's promise had been direct to pay the plaintiff that sum, it is not denied that it would have been of that collateral or accessorial character intended by the statute.

The cases cited of a promise to accept a bill of exchange, are not analogous. The acceptor is the principal debtor in respect to funds in his hands. He owes the money to the drawer, and the bill merely works a transfer of that fund to the payee. The acceptor engages to put himself in a position by which he will be obliged to pay his own debt. The drawer is the collateral

undertaker. The cases do not say that a parol promise to accept and pay the debt of another for his accommodation, is valid. Unlike the case of an acceptor, the indorser of a note is the collateral debtor, the maker being the principal; and if this were otherwise on the nature of an indorsement, the statement in the declaration shows that the particular one in contemplation was an accommodation indorsement for G. B. & J. L. Crane. In other words, it was a promise to become their surety for the debt. On fulfilling the promise by making and paying such an indorsement, the defendant might have recovered over against them as for money paid to their use. Their assent to the defendant's promise is perhaps to be intended; but whether so or not, the defendant finally joining them in the note implies their ultimate assent that he would take the exact position of their surety. To say then that this is not in effect a promise to answer their debt, would be a sacrifice of substance to sound. It would be devising a formulary by which, through the aid of a perjured witness, a creditor might get round and defraud the statute. He may say, "You did not promise to answer the debt due to me from A.; but only to put yourself in such a position that I could compel you to pay it." Pray, where is the difference, except in words? According to such reasoning, unless you recite the words of the statute in your undertaking, it will not reach the case. No legislative provision would be worth anything upon such a construction. It is, I fear, somewhat upon this narrow view that *Bushell v. Beavan*, 1 Bing. N. Cas. 103, may have been decided. There, the defendant undertook, not that himself, but that another should guarantee the debt. What was this but shouldering it himself? A perjury which would fasten him with such an engagement might be worth just as much to the creditor as one which would fabricate a direct promise. The witness, by hitting on a responsible man as the contemplated guarantor, might make the defendant's promise in effect precisely the same as if direct. The statute was intended to prevent the effect of perjuries. Indeed, that is known to have been its primary object, which should never be out of view in giving it a construction. It was truly asked by counsel, what is the difference between this case and that cited? I admit there is no difference in principle; but I think the case cited can not be sustained.

We are referred to the *dictum* of Mr. Justice Story in *D'Wolf v. Rabaud*, 1 Pet. 500, where, however, the learned judge admits he is not following the construction of the statute, but suggesting what might be the better construction were the question

res nova; viz., that where the engagement of the surety and principal are simultaneous and on the same consideration, the case is not within the intent of the legislature. He admits that the authorities are against his views; and the cause went off upon the cases of *Leonard v. Vredenburg*, 8 Johns. 29 [5 Am. Dec. 317]; *Bailey v. Freeman*, 11 Id. 221 [6 Am. Dec. 371], and *Nelson v. Dubois*, 13 Id. 175. The doctrine in these cases related to simultaneous contracts in writing by principal and surety; that of the latter admitted to be collateral, but deriving its aliment from the consideration expressed in the first. On a familiar principle, they are both one contract, and the collateral is sustained by an implied reference to and adoption of the consideration expressed in the principal contract. The case of *Jarman v. Algar*, 2 Car. & P. 249, is relied upon. There the defendant promised to execute a bail bond, if the plaintiff would not arrest another. This was in effect a promise to see that special bail should be put in. It was the duty of the principal to put in bail; and there is certainly some doubt whether the engagement was not collateral to answer for his default in not doing this, and so within the statute. The decision was made at *nisi prius*, without stating any ground. The question was novel. It was, I admit, decided by a very able judge; but is open to the objection I have already mentioned, of being too literal a construction of the statute.

In *Chapin v. Merrill*, 4 Wend. 657, there was a promise to indemnify the plaintiff, if he would become surety for the debt of R., due to another; and the action was held sustainable on the ground that the promise to indemnify was not a contract collateral to that of R., nor did the defendant's engagement run to the creditor of R. It was, however, in effect, collateral to the implied contract of R. to indemnify the plaintiff; and a liberal construction of the statute might in that view be made to reach it. But the case before us is one of an engagement to the creditor who sold the goods; and so distinguishable from *Chapin v. Merrill*. The case of *Chapin v. Lapham*, 20 Pick. 467, is in form like that of *Chapin v. Merrill*, which was cited with approbation by Shaw, C. J. The point of the latter case was not, however, decided; for the original debtor being a minor, the whole credit was in effect given to the defendant. His promise was not collateral.

In *Harrison v. Sawtel*, 10 Johns. 242 [6 Am. Dec. 337], the promise of the defendant to indemnify the plaintiff for becoming bail in a suit against another, was made by the real party to

that suit; the person alone interested to defend it. The promise was, therefore, in effect on his own account as principal. The person who was sued and obliged to give bail was the surety. Such a promise of indemnity was clearly without the statute. So, in *Hassinger v. Solms*, 5 Serg. & R. 4, the promise to indemnify was for becoming surety in behalf of the defendant for his own debt. I do not see that in the last case any question was made on the statute of frauds and perjuries.

I have now gone through with the cases mainly relied on by the counsel for the plaintiff, and one more which I have fallen upon. He has furnished us, in his argument, with the full strength of his case, so far as it depends either on authority or principle. But I think that neither will warrant us in giving to the statute that narrow and literal construction for which he contends, and which I admit some of the cases countenance. On the contrary, I am of opinion that the view taken of this question by Mr. Justice Woodworth, in *Gallagher v. Brunel*, 6 Cow. 346, is more in harmony with the intent of the statute. He there comments upon this promise to a creditor that the defendant would indorse the note of the debtor. In that case, the defendant refusing, the creditor treated the refusal as a fraud; and having sold goods on the faith of the promise, brought an action as for a deceit. This court, however, considered the action as a mere experiment for getting round the statute, holding the declaration bad on demurrer. It is said the case is not to the present point. True, it is not circumstantially so; perhaps not exactly so in principle. But in deciding it, the attention of the court was almost necessarily drawn to the point. We may therefore assume that it was discussed after it had undergone consideration by all the justices. Be that as it may, however, I think the view taken is sustained by a liberal construction of the statute. Such a construction is due to it, on the ground that it was intended to prevent fraud and perjury.

Judgment for the defendant.

PAROL PROMISE TO ACCEPT BILL FOR GOODS SOLD TO ANOTHER is valid, when: See *Kennedy's Ex'r v. Geddes*, 37 Am. Dec. 714, and note. In *Westcott v. Keeler*, 4 Bosw. 572, the doctrine of the foregoing decision, that a parol promise to indorse another's note for goods furnished to him, is void, is referred to with approval.

PROMISE TO PAY FOR GOODS FURNISHED TO ANOTHER, when within the statute of frauds and when not: See the note to *Kennedy's Ex'r v. Geddes*, 37 Am. Dec. 718, collecting the previous cases in the American Decisions on this point. And generally as to when a promise to pay another's debt is to be deemed within the statute, and when not, see *Nelson v. Boynton*, Id. 148,

and cases cited in the note thereto. See, also, *Aldrich v. Jewell*, 36 Id. 330, and note. The rule is, that if a promise of one to pay for goods furnished to another is collateral and not original, and if the credit is not wholly given to the promisor, the statute of frauds applies, and the promise must be in writing to be valid: *Allen v. Scarff*, 1 Hilt. 212; *Dizon v. Frazee*, 1 E. D. Smith, 35; *Brady v. Sackrider*, 1 Sandf. 515; *Knox v. Nutt*, 1 Daly, 213. And generally, if the liability of the principal debtor continues, one who promises to pay his debt is only collaterally bound, and the promise is void if not in writing: *Eddy v. Roberts*, 17 Ill. 507; all citing the principal case. In *Baker v. Dillman*, 12 Abb. Pr. 316; S. C., 21 How. Pr. 446, the case is cited as weakening and doubting the doctrine of *Chapin v. Merrill*, 4 Wend. 657, that a promise to indemnify one for becoming guarantor for another is not within the statute of frauds. In *Kingsley v. Balcome*, 4 Barb. 138, it is said that *Carville v. Crane* is the only case which the court could find referring to *Chapin v. Merrill*.

DOLLFUS v. FROSCH.

[5 HILL, 493.]

MOTION CAN NOT BE RENEWED WITHOUT LEAVE OF THE COURT after being once denied, and this rule applies to a motion for a commission to take testimony, denied by the supreme court because of a formal defect in the affidavit. Hence, an order obtained from a circuit judge, after such denial, granting the commission, without a previous application to the supreme court for leave to renew the motion, is irregular, though, under special circumstances, it may be permitted to stand on payment of costs.

MOTION to vacate an order made by a circuit judge granting a commission to take testimony, a motion for such a commission having been previously denied by this court. It appeared that the former motion was denied because of a formal defect in the affidavit.

D. D. Field, for the motion.

J. Edwards, *contra*.

By Court, BRONSON, J. A motion can not be renewed without first obtaining leave of the court: *Mitchell v. Allen*, 12 Wend. 290. And this rule applies to motions for a commission, as well as in other cases: *Allen v. Gibbs*, 12 Id. 202. In that case a commission was denied by this court on the ground that a previous application had been refused by the circuit judge. If a motion can not be renewed here after it has been passed upon by a commissioner, clearly the commissioner should not act after we have decided the question. The fact that the papers were insufficient on the first application does not alter the case. Where a party fails in a motion on the ground of some formal defect or insufficiency in his papers, he should ask leave to renew

the motion, or that it be denied without prejudice to another motion; and if the request is granted, the fact should be stated in the rule. Here the motion was denied generally, and it was therefore necessary to obtain leave to renew it before the party could have a commission. And the leave to renew could only be granted by the court.

But, under the special circumstances disclosed in the affidavits, the commission may stand on payment of costs.

Ordered accordingly.

MOTION ONCE DENIED CAN NOT BE RENEWED WITHOUT LEAVE of the court, so long as the facts continue the same: *Pike v. Power*, 1 How. Pr. 164, which was a case of a motion to set aside a default; *Bascom v. Feasler*, 2 Id. 17, a motion to set aside a judgment for irregularity; *Bellinger v. Martindale*, 8 Id. 114; *Mills v. Thursby*, 11 Id. 115; *Hall v. Emmons*, 39 Id. 189; 8 C. C., 8 Abb. Pr. (N. S.) 453; 2 Sweeney, 399; *Irving Nat. Bank v. Kernan*, 3 Redf. 5; *Belmont v. Erie R. Co.*, 52 Barb. 647. But the principle of *res adjudicata* does not apply to a decision on a special motion: *Acker v. Ledyard*, 8 Id. 518; *Belmont v. Erie R. Co.*, 52 Id. 647; *Boon v. Moss*, 70 N. Y. 474. The court may, in its sound discretion, permit the renewal of such a motion, without prior leave therefor having been obtained, as where the original application was dismissed by a subordinate tribunal without any ground whatever: *People ex rel. Wilbur v. Eddy*, 3 Lana. 83. At most it is only while the facts remain the same that a party, whose motion has been once denied, is estopped from renewing it: *Akerty v. Vilas*, 3 Biss. 342. When new facts have arisen, the motion may be renewed as a matter of right: 52 Barb. 637. In all these cases, *Dollfus v. Froesch* is cited as authority. As to the right to renew an application for a writ of *habeas corpus* after it has been once denied, see *Mercin v. People*, 35 Am. Dec. 653; *People v. Mercin*, 38 Id. 644, and the notes thereto.

BROWNING v. HANFORD.

[5 HILL, 588.]

SHERIFF IS NOT LIABLE FOR CASUAL LOSS OF GOODS BY FIRE after a seizure on execution, though he leaves them with the debtor, taking a receipt from a friend of the latter promising to deliver them on demand or to pay the amount of the execution. *Contra*, COWEN, J.

RECEIPTOR OF GOODS SEIZED ON EXECUTION IS ORDINARY BAILEE only, and is not liable as an insurer, even though he be the debtor or a friend of the debtor, unless his contract is very special and explicit. *Contra*, COWEN, J.

POWER OF SHERIFF TO EXACT INDEMNITY FROM RECEIPTOR beyond his own liability to the creditor denied by NELSON, C. J., and BRONSON, J.

CASE against the defendant as sheriff for not collecting the amount of an execution. From the sheriff's return it appeared that sufficient goods were levied on, but were left with the debtor, the sheriff taking a receipt from one Ellsworth, in which the goods were estimated at two thousand dollars, the

receiptor agreeing to deliver them on demand, or to pay the amount of the execution, and that pending a subsequent stay of execution the goods were "casually consumed by fire." The return further certified that Ellsworth was of sufficient responsibility. Motion for a nonsuit overruled, and the circuit judge charged the jury in substance that under the circumstances the loss of the goods by fire did not exonerate the sheriff. Verdict for the plaintiffs, and motion for a new trial.

H. Welles and F. M. Haight, for the defendant.

A. Gardiner, for the plaintiffs.

COWEN, J. The circuit judge put the case to the jury upon the sheriff's return. Had the judge denied its force as evidence, the sheriff might have shown the exculpatory facts by proof *aliunde*. The return must therefore be regarded as evidence for the purposes of this motion, and as the only defensive evidence in the case. The ground of defense is that, though sufficient goods were levied on, they were immediately (May 21st) delivered to a receiptor. That on the thirty-first there was an order served to stay the sheriff till the next August term, the goods in the mean time (June 22d) being casually consumed by fire. The receipt mentioned the goods as seized under execution at the suit of the plaintiffs, agreed on their value at two thousand dollars, and stipulated to redeliver them on demand or pay the value.

The property of the sheriff in goods seized by virtue of a *fi. fa.* is analogous in most points to that of an ordinary bailee of goods for the purpose of custody and sale. He is very nearly in the case of a factor *del credere*, the keeper and seller of goods with an obligation to guarantee the sale and a lien on the proceeds to secure his compensation. He also acts, like the factor, under a power which may be revoked or controlled by others having a paramount interest. The factor is generally held liable for ordinary diligence in his vocation. He is "not liable for any losses by theft, robbery, fire, or other accident, unless it is connected with his own negligence." Story on Bail. 296. He is of course warranted in delegating his trust, or such portion of it as the exigencies of business may require, to his servants. In all these respects there is an obvious parallel between his rights and obligations and that of the sheriff. And looking upon the latter, for the present, as holding the personal custody of the goods, or as having left them with servants whose interests were indifferent between the parties, I think the return must be considered as making out a complete defense. It says, the goods

were casually destroyed by fire. It describes an accidental destruction, for which a factor would not be liable. If the return is to be taken as showing generally that they were destroyed, not saying casually, this would probably call for proof on the part of the plaintiff that there was some negligence in the sheriff or his delegate. The intendment is, that a bailee has done his duty till the contrary has been shown. There are exceptions; but the general rule is as I have stated.

That a bailee of goods holds them in the capacity of a public officer, has never, that I am aware, been considered as fixing a more rigorous measure of liability upon him than if he were a private person. The contrary has been held in respect to several officers. One instance is that of receivers: *Knight v. Plymouth*, 3 Atk. 480; another that of a county treasurer: *Supervisors of Albany Co. v. Dorr*, 25 Wend. 440; another that of a post-master: *Id.*, and the cases there cited. So as to revenue officers: *Burke v. Trevitt*, 1 Mason, 96, 101, 102, and the cases there cited. The general liability of officers having the charge of property is put by Mr. Justice Story on the same footing as that of bailees for hire: *Story on Bail*. 96, sec. 130; *Id.* 390, sec. 620. The same doctrine was assumed as applicable to sheriffs holding goods taken by attachment, in *Jenner v. Joliffe*, 6 Johns. 12. Nor are the cases cited by the plaintiff's counsel from the Massachusetts reports in any way incompatible with it. It was supposed that a peculiar obligation arises from the seizure upon execution operating as a satisfaction of the debt. But this effect must be taken with many qualifications: *Green v. Burke*, 23 Wend. 496-502. No case goes the length of saying that, if the goods be destroyed without any fault of the sheriff, the plaintiff shall not be entitled to sue out a new execution, or the sheriff to make a new levy.

The principle of liability for escapes certainly admits of no excuse which would not exempt a common carrier: *Wats. Sher.* 140, 141, and the books there cited; *Fairchild v. Case*, 24 Wend. 383, and the books there cited; *Dy.* 66, b. A rule so rigorous like that which binds the carrier, probably found its way into the law upon grounds applicable to the particular case. In *Green v. Hern*, 2 Penn. 170, Gibson, C. J., said, the reason of the rule is precisely the same in both cases. He mentioned the difficulty of proving negligence in the first instance, with the danger of corruption and collusion. In *Wheeler v. Hambright*, 9 Serg. & R. 396, he had previously said that the strictness of the law arose from public policy, and then assigned some of the

reasons which influence the case of the carrier. An additional argument arises from the sheriff's power to raise the *posse comitatus*, and the fact that a public jail is provided for him. This will be seen by 1 Roll. Abr., *Escape* (D), 807. He says that a rescous from an arrest on mesne process may excuse an escape, if made before the prisoner be carried to jail, because the sheriff is not bound to carry the *posse* with him; though otherwise if the arrest were on a *ca. sa.* after the prisoner reaches the jail. He puts the increased responsibility on an obligation "to conserve his jail at his peril." It is true he may, if he think proper, call in the *posse* to aid in preserving goods: Dalt. Sher. 104, c. 21; Id. 354, c. 95; 2 R. S. 359, 2d ed. But the call has reference to actual or apprehended resistance: Id.; Id.; not to casual losses. It is doubtful whether the sheriff can command the gratuitous service of citizens for the mere purpose of guarding against ordinary accidents. We know this is never thought of, especially in the case of seizing and taking care of goods. Independently, therefore, of the security taken by the sheriff from one who receipts the goods for the benefit of the debtor, I have been unable to perceive that the obligation in question transcends that of any other bailee for hire.

My opinion is, however, that a very different consideration arises out of a receipt given by the debtor's friend, with the understanding that the debtor is to have the custody till a sale. This is, to be sure, the ordinary course. It is perfectly lawful; but the goods are then no longer in impartial hands. They are with a man whose interest it is to secrete them for his own use, and whose feelings are perhaps embittered by the litigation which has resulted in the seizure. In short, he is not a safe delegate with whom to intrust the goods for safe-keeping, either against eloignement or destruction. His interest and feelings may lead him to promote the one or the other. I am of opinion, therefore, it would be an act of misfeasance in the sheriff to leave the goods in his custody, without taking security for something more than he would be bound to exact from his deputy or other prudent and indifferent bailee. In such a case it has accordingly been said of a ship so receipted, sent to sea by the debtor, and lost, that the sheriff is at all events liable: *Phillips v. Bridge*, 11 Mass. 242, 247. See, also, *Tyler v. Umner*, 12 Id. 163, 167, and *Congdon v. Cooper*, 15 Id. 10, 14.

Looking at the question as between the sheriff and receiptor, and laying the debtor out of view, the duty which the former has raised to himself is enhanced, by implication of law, one

degree beyond that of his own. There is no compensation in the matter; but a gratuitous loan for the receiptor's accommodation. This relation of itself binds him to an extraordinary degree of diligence, and I think should raise a corresponding obligation as between the sheriff and the plaintiff. But more, it seems to me the argument of Parker, J., in *Phillips v. Bridge*, presents the matter in its true light. He says, the creditor is no party to the receipt, nor has he any interest in the contract made with the receiptor, who is responsible only to the officer. The officer is supposed to have in his custody all the goods and chattels attached; and if any loss happen in consequence of his bargains with the debtor, he must be the loser, for he parts with the property at his peril.

In the case at bar, the sheriff very properly proceeded upon these considerations, by taking just such a contract from the receiptor as I think every officer is bound to take, before he allows goods to pass out of his own care, or that of his ordinary servants. The stipulation was, to return the goods on demand, or pay the agreed value. Even without the latter clause, here would be more than a general bailment, or a contract merely to keep safely, as in *Southcot's Case*, 4 Rep. 83, 84; or to carry safely and securely, as in *Coggs v. Bernard*, 2 Ld. Raym. 909. The agreement would be, to redeliver on demand, without qualification; in legal effect, at all events. The distinction in *Paradine v. Jane*, Aleyn, 26, applies. The defendant refused to pay his stipulated rent, because he was expelled from the premises by Prince Rupert, an alien, heading an army of alien enemies. The court said, if the obligation to pay had been raised by the law, he should be excused; but being express, by covenant, the law would not protect him. See *Brecknock Comp. v. Pritchard*, 6 T. R. 750. In the last case, it is said, if a loss is intended to be excepted, the agreement should be worded accordingly. In *Hadley v. Clarke*, 8 Id. 259, 267, the party had contracted to carry goods, but was hindered by an embargo; yet the court held him liable. Lawrence, J., stated the rule in Aleyn, and put the case expressly upon it: *Vide Story on Bail*. 24, 25. In the case at bar, the receiptor made himself an insurer. The duty of the general bailee is graduated by implication of law, on the nature of the bailment. But he may always tighten and, in most cases, relax it, by express stipulation. An ordinary case is that of the factor under a *del credere* commission, who stipulates to guarantee the solvency of those to whom he sells the goods of his principal.

But the case before us is still stronger. If the receptor did not deliver, he was to pay the two thousand dollars. It is impossible, I think, after all this, without indulging in a very dangerous disregard of the rule binding a party by his express stipulation, to excuse him, even if the failure had arisen from such inevitable cause as would discharge a common carrier. Can it be doubted for a moment that the sheriff's liability is commensurate with the security he holds? The ability of the receptor to pay is not questioned; and if it were, the sheriff could not excuse himself for that reason. He was under no obligation to deliver over the goods, and must see at his peril that the substituted security be available. See the Massachusetts cases already cited; also Story on Bail. 96, sec. 128. The law looks to the remedy over. One reason assigned for the sheriff's liability for an escape, procured even by rebels and traitors, is that he may have his remedy by action against them: Dy. 66, b. It is of the nature of every trust, that where the trustee parts with the fund, and takes a substituted security, he is guilty of a conversion and must answer at all events. Besides, he here takes a security so framed as absolutely to fetch the money into his own hands. Is it to be endured that he shall hold it as a godsend for his own pocket by telling the *cestui que trust* that the goods were burnt? Suppose the receptor had paid him the money immediately after the fire. What difference is there in principle between the money and an absolute available security? But it has long since been adjudged that a sheriff takes security at his peril. Though he take a bond not collectible, he is liable, according to a case cited in *Ward v. Hauchet*, 1 Keb. 551, and recognized by this court as law in *Reed v. Pruyn*, 7 Johns. 429 [5 Am. Dec. 287]. See also *Hoyt v. Hudson*, 12 Id. 207, 208. There is difficulty enough arising from the laxity of our laws for collecting debts, without raising an interest in the sheriff to defeat the creditor after he has had the unusual good fortune to reach the goods of the debtor. In cases where the sheriff is bound to take bail, as for a party's appearance, his obligation is measured by that of the surety. He must see that special bail is put in. *A fortiori*, where he has an option to retain the subject or take security for its forthcoming.

On the whole, I am of opinion that a new trial should be denied.

NELSON, C. J. I can not concur in the result of the opinion just delivered. Assuming that a sheriff may take a receipt for goods levied on, which will give him a remedy even though the

property be afterwards destroyed by inevitable accident, it is quite clear that no such remedy can be said to exist unless the contract of the receiptor be very special and explicit, leaving no doubt of his intention to insure against casualties. Short of this, he is regarded as an ordinary bailee for hire, and responsible only for the safe-keeping of the goods upon principles applicable to that species of bailment. There are numerous cases in the books establishing this doctrine: See *Brown v. Cook*, 9 Johns. 361; *Dillenback v. Jerome*, 7 Cow. 294; Story on Bail. 96-98, 390, 391. A very respectable body of authority may also be found for saying that, even where the bailee has entered into a special undertaking to keep the goods safely, and deliver them when called for, he is not liable for losses arising from unavoidable calamity: Jones on Bail. 43-45; Doc. & Stu. Dial. 2, c. 38; Story on Bail. 24. But at all events, without some such particular and special engagement, there is no foundation laid for the extraordinary liability mentioned.

The contract evinced by the receipt in the present case does not essentially vary from the one in *Brown v. Cook*, or in *Dillenback v. Jerome*, in both of which instances the court regarded the receiptor as an ordinary bailee. In *Brown v. Cook*, the defendant receipted a span of horses levied on by a constable, promising to deliver them at a particular place on demand. The engagement was in terms equally absolute and unconditional with that of the receiptor in the case under consideration. The undertaking of the receiptor here is nothing more than what would be raised by implication of law upon the deposit of property for a limited period, in which case no one would claim that the bailee had incurred an obligation like the one now insisted on. Indeed, the obligation of the receiptor in the present case, if practically enforced upon the principles contended for, would exceed the rigorous severity of that imposed upon common carriers, which has never been claimed as arising out of the terms of their contract, though usually very similar to the one in question, but only out of the custom of the realm.

It appears to me we shall yield the full measure of liability to the sheriff, in cases like the present, if we make it commensurate with his liability over to the plaintiff in the execution. This will afford the sheriff full indemnity—the sole object of taking the security—and work no injustice to the plaintiff. He has sought satisfaction of his demand by judgment and execution in due course of law, and his appropriate remedy, indeed his only one, is against the officer. When that fails, his legal rem-

edy is exhausted. The proposition has been laid down as a general one, that in case the officer be discharged from all liability over, his right to maintain an action against the receptor is gone: Story on Bail. 95, sec. 126.

It may well be questioned, I think, whether the sheriff has a right to take security by way of receipt extending beyond the limit of his own responsibility to the plaintiff in the execution. Taking the security is an official act on the part of the sheriff, and should be confined within the scope of his official authority and obligation; and why he should be allowed to stipulate for more than an indemnity, is not easily perceived. The spirit of the statute which declares that he shall not "take any bond, obligation, or security, by color of his office, in any other case or manner than such as are provided by law," 2 R. S. 286, sec. 59, would seem to forbid it.

Brownson, J. When the sheriff levies upon goods, he must be diligent to keep them safely to satisfy the execution. But he is not an insurer, and is not, like a common carrier, answerable for a loss of the goods by fire. Thus far I concur in the opinion of my brother Cowen. But I can not agree that the extent of obligation contracted by the receptor should have any influence upon the liability of the sheriff. When the sheriff leaves the goods with the debtor, either with or without a receipt from some third person, he assumes the risk of answering to the creditor if the property be lost through the negligence or any wrongful act of the debtor. But I do not perceive that the taking or omitting to take a receipt, or the extent of liability which the receptor may contract, can have any effect upon the rights of the creditor. He is not a party to the receipt, nor has he any interest in it: *Phillips v. Bridge*, 11 Mass. 247. If a receipt be taken which, either through defect of form or the insolvency of the receptor, proves to be of no value to the sheriff, he must still answer to the creditor for the loss of the goods. And on the other hand, if the sheriff may and does take a receipt which gives him a remedy beyond what, under other circumstances, would have been the extent of his own liability, I do not see how that can confer any right upon the creditor. He has nothing to do with any right of action which the sheriff may have acquired against a third person; and if we assume that the sheriff might in this case recover against the receptor, I am of opinion that this action can not be maintained.

But I think the sheriff can not take a receipt or any other contract in relation to the property, which will give him a rem-

edy beyond his own liability to the creditor. He may appoint a deputy or assistant to aid in taking care of the property, or may deliver it to a bailee to be kept until the time of sale; and he may take a contract from the deputy, assistant, or bailee, for an indemnity in case the goods shall be lost. But he can not go beyond that, and take an agreement for anything more than an indemnity. That would be using his office and the process of the court for the purpose of making a profit or advantage to himself beyond his legal fees. Such a security has not been authorized by law, and, being taken by color of his office, would be void: 2 R. S. 286, sec. 59. If upon the true construction of this receipt, the person who gave it has agreed for anything more than an indemnity to the sheriff, the contract is either wholly void, or else it is bad for the excess. I do not intend to say that the contract must be in the form of an agreement to indemnify and save harmless. The sheriff may undoubtedly take such a contract from the bailee as will give him an action although he has not himself been sued or proceeded against in any other form. But if in a suit against the bailee, the facts appear to be such that the sheriff is not answerable over to the creditor, the action can not be maintained. And so in any view of the question, I am of opinion that the liability of the sheriff is to be determined without any reference to the terms of the receipt.

New trial granted.

SHERIFF'S LIABILITY FOR LOSS OF GOODS LEVIED ON.—For a loss of attached goods while in the keeping of a bailee of the plaintiff's appointment, the sheriff is not liable: *Donham v. Wild*, 31 Am. Dec. 161. The principal case came again before the supreme court in 7 Hill, 120, where it was held that the return of the sheriff that the goods were casually lost by fire was *prima facie* evidence in his own favor in an action for not collecting the money. This decision was, however, reversed by the court of errors: *Browning v. Hanford*, 5 Denio, 586. In the latter court, Senators Spencer and Wright supported the doctrine laid down by Cowen in his opinion in the principal case, holding that where a sheriff after a levy leaves the goods in the debtor's possession, taking the receipt of a third person promising to redeliver the goods or pay the debt, he is liable for their loss unless occasioned by the act of God, or of public enemies, but the chancellor dissented. The point was not, however, necessary to the decision. That a sheriff is liable only for ordinary care of goods after a levy, and therefore is not liable for a casual loss by fire, is held, citing the principal case, in *Crofut v. Brandt*, 47 How. Pr. 237; S. C., 58 N. Y. 111. The case is cited to the same effect, *arguendo*, in *Farmers' etc. Bank v. Kingsley*, 2 Doug. 399. Hence he can not charge for insuring the goods nor for extra keepers: *Crofut v. Brandt*, *supra*. Similarly, a United States marshal having seized goods of a bankrupt, being liable only as an ordinary bailee, is not entitled to any extra allowance for the safe-keep-

ing of the property: *Matter of Hare*, 43 How. Pr. 87. A sheriff, having seized coal on replevin against the master of a vessel, left the same on board in charge of a keeper, with the master's consent, and the vessel having been sunk by a storm, whereby the coal was damaged, it was held, citing the principal case, that the sheriff's liability was not that of an insurer, but only that of an ordinary bailee for hire, and that he was not chargeable for the loss unless occasioned by his neglect: *Moore v. Westervelt*, 25 Id. 281; S. C., in the court of appeals, 21 N. Y. 107. Selden, J., however, said in the latter court, that although the sheriff was not an insurer, he was bound to more than ordinary care of property which was the subject of litigation. He commented on the principal case at length, and said that in view of the subsequent proceedings, it was doubtful what the final decision really was. On a subsequent appeal to the latter court, it was held that a charge that the sheriff was liable for such care as a careful and prudent man would exercise, was sufficiently favorable to him: *Moore v. Westervelt*, 27 Id. 234. But although the sheriff is not an insurer and can not charge for insuring the goods, his liability as bailee gives him an insurable interest in the goods: *White v. Madison*, 26 How. Pr. 487; S. C., 26 N. Y. 126. In analogy to the doctrine of the principal case, it is held that a party taking up cattle running at large, by virtue of a statute, is only an ordinary bailee, and is not liable for the loss of the cattle if stolen from his possession without any neglect or fault on his part: *Hard v. Nearing*, 44 Barb. 488.

RECEIPTOR'S LIABILITY FOR SAFE-KEEPING OF GOODS: See *Phillips v. Hall*, 24 Am. Dec. 108, and cases cited in the note thereto. That a sheriff can not take indemnity from a receiptor beyond his own liability is a point to which the principal case is cited, *arguendo*, in *Ball v. Pratt*, 36 Barb. 405, quoting with approval the language of Bronson, J., on that point. In *Hitchins v. Warner*, 5 Id. 679, the principal case is cited and commented on, and the views of Nelson, J., approved as to the extent of a receiptor's liability for goods in his custody, in discussing the question whether a tenant who has covenanted to restore leased premises in the same condition as when he received them, is bound to rebuild a house thereon which is casually destroyed by fire. The decision was that he was not bound to do so.

STATE OF INDIANA v. WORAM ET AL.

[6 HILL, 33.]

ONE STATE OF THIS UNION MAY SUE IN THE COURTS of any other state thereof.

THE NON-JOINDER OF A PARTY DEFENDANT, where it does not necessarily appear from the complaint, must be pleaded in abatement.

NON-JOINDER OF A CORPORATION AS A PARTY DEFENDANT is not so apparent as to be reached by demurrer, where the complaint, though it shows that such corporation once existed, and was a proper party, does not show that such existence continued up to the filing of the complaint.

COMPLAINT UPON A PROMISE TO ANSWER FOR THE DEBT OF A THIRD PERSON need not aver that the promise or consideration was in writing.

BILLS OF CREDIT.—Bonds or other paper issued by a state, but not intended nor adapted to circulate as money, are not bills of credit.

CORPORATION HAS NO POWER TO PURCHASE OR DEAL IN STATE BONDS, if it is incorporated to engage "in whale fishery and in the manufacture of oil and spermaceti candles;" but it was held in this case that it could not avoid its obligation given for such bonds.

THE WORD PERSON may extend to corporations as well as natural persons. A STATE IS A CORPORATION, and as such may be the payee of a note.

ASSUMPT. There were thirty counts in the declaration. Of these, twenty-eight were demurred to. The grounds of demurrer sufficiently appear in the opinion.

J. W. Gerard, for the defendants.

L. Hoyt, for the plaintiffs.

By Court, BRONSON, J. It seems from this declaration that the state of Indiana exchanged its credit, to the amount of sixty thousand dollars, for the credit of the Staten Island Whaling Company, backed up by the undertaking of the defendants. The company having made default, the defendants are unwilling to pay, and the question is upon their liability. There are seven sets of counts, each set containing four counts, so that the pleader has set out each of the four contracts on which the plaintiffs sue in seven different forms. I shall only examine this long declaration so far as exceptions were taken to it on the argument.

The first objection to the declaration, and it is one which goes to all the counts, is, that one of the states of this union can not sue in our courts. That objection is answered by the case of *Delafield v. The State of Illinois*, 2 Hill, 159. The second, fifth, and seventh sets of counts are on joint and several undertakings by the defendants and the whaling company, and the objection is, that all the contracting parties must be sued jointly, or each separately. But the answer is, that the defendants have not pleaded the non-joinder of the company in abatement: 1 Saund. 291, note 4; 1 Chit. Pl. 29, 30. It does not appear from the declaration that the Staten Island Whaling Company is still an existing corporation, and it would not be a very violent presumption to suppose that it has before this time ceased to be. After the officers of the company had got hold of the state bonds, it is not very improbable that the project of catching whales and making spermaceti candles was abandoned, and the charter may have been surrendered, or annulled by legal proceedings. But without resorting to any presumption on the subject, it is enough that it does not affirmatively appear that there is another contracting party in existence who ought to have been joined with these seven defendants.

The first set of counts are upon collateral undertakings by the defendants to pay the debts of the company, and it is not alleged, as it is in the third set of counts, that the consideration for the promises was in writing. It has been long settled that the declaration need not allege that the agreement—and the consideration is part of it—was in writing: it is matter of evidence. The counsel supposes that the revised statutes (2 R. S. 135, sec. 2) have altered this rule of pleading; but we think not. The present statute of frauds has only declared what was held to be the rule under the former statute, viz., that the consideration as well as the promise must be in writing. The law is precisely the same now as it was before, and there is no reason for changing the rule of pleading.

The second and third sets of counts state the consideration for the undertakings to be the sale and delivery by the plaintiffs of their bonds for the payment of money with interest. It is said that these bonds were bills of credit, which the state is forbidden to emit by the federal constitution; and we are referred to *Craig v. The State of Missouri*, 4 Pet. 410, 430; *Federalist*, No. 44, 193; 3 Story on the Const. 220; *Delafield v. State of Illinois*, 26 Wend. 217; and *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 312. These books prove that all attempts to give a full, accurate, and satisfactory definition of bills of credit, within the meaning of the constitution, have thus far failed. But nearly all are agreed that the paper prohibited can only be such as is designed to circulate as money, or answer the ordinary purposes of coin; and it is enough for the present case to say, that the bonds issued by the plaintiffs do not appear to have been intended for, or that they were adapted to that use.

Another objection to the second and third sets of counts is, that the Staten Island Whaling Company has no power by its charter to purchase or deal in state bonds. It was incorporated "for the purpose of engaging in the whale fishery, and in the manufacture of oil and spermaceti candles;" and has only such general powers as are incident to all corporations: Stat. of 1838, p. 76, secs. 1, 10, 11; 1 R. S. 599, secs. 1-3. I agree with the counsel for the defendants that this company had no authority to purchase or deal in these bonds. But since the decision in *Moss v. The Rossie Lead Mining Company*, 5 Hill, 137, I do not see that a corporation can ever avoid its obligation on the ground that it was given for property which the corporation was not authorized to purchase. And if the company was bound, I see no reason why the defendants should not also be bound by the contract.

The last four sets of counts are upon promissory notes, made payable to the plaintiffs, and it is said that a state is not a "person" within the statute of Anne, and can not, therefore, be a party to a promissory note. Our statute is, that "all notes in writing made and signed by any person, whereby he shall promise to pay to any other person, or his order," etc., shall be negotiable, etc.; and that "the word 'person' in the two last preceding sections shall be construed to extend to every corporation capable by law of making contracts:" 1 R. S. 768, secs. 1-3. It did not require the aid of the legislature to prove that the word person in a statute may extend to a corporation as well as to a natural person: *The People v. Utica Ins. Co.*, 15 Johns. 358 [8 Am. Dec. 243]. That a state is a corporation can not be doubted. It is a legal being, capable of transacting some kinds of business like a natural person, and such a being is a corporation: *The People v. Assessors of Watertown*, 1 Hill, 620. I see no reason for doubt that a state may be the payee of a promissory note.

No other objections have been taken to the declaration, and the plaintiffs are entitled to judgment on all the counts.

Judgment for the plaintiffs.

The case of *Moss v. Rossie Lead Mining Co.*, 5 Hill, 137, cited and relied upon by Judge Bronson, appears to have been overruled in the court for the correction of errors: 5 Denio, 567. In this case the rule was asserted and applied, that a note given by a corporation "for purposes and objects unauthorized by its charter is, therefore, not obligatory." This seems to be the true rule upon this subject: *N. Y. F. Ins. Co. v. Ely*, 13 Am. Dec. 100, and note; *Bank of Chillicothe v. Swayne*, 32 Id. 707, and note.

IN PLEADING A CONTRACT which the law requires to be in writing, the pleader need not state whether the contract was written or oral: *Kibby v. Chitwood's Adm'r*, 16 Am. Dec. 143, and note.

CONTRACTS OF A CORPORATION, *ULTRA VIRES*.—Contracts must be either executory or executed. If a contract of a corporation, confessedly *ultra vires*, be of the former character, it will not be enforced; but a different case arises where the contract has been executed by one party, and the other has received from him the consideration thereof. The principal case has been frequently referred to in this state in subsequent cases of this latter sort; and it seems established by them that a corporation shall not be allowed to plead, in an action upon a contract whereof it has received the consideration, that it was beyond its powers to enter into it: *Madison Avenue Baptist Church v. Baptist Church*, 30 How. Pr. 471; S. C., 1 Abb. Pr. (N. S.) 227; S. C., 3 Rob. 595; *Town of Verona v. Peckham*, 66 Barb. 113. The estoppel is reciprocal, and therefore, if the corporation be the plaintiff, and the defendant be the one who has received the benefit of the contract, he shall not be allowed to defend upon the ground that the contract is *ultra vires*: *Steam Navigation Co. v. Weed*, 17 Barb. 331; S. C., 63 N. Y. 71; S. C., 53 How. Pr. 510; *Cheever v. Gilbert Elevated R'y Co.*, 43 N. Y. (Super.) 434.

Whether these cases are entirely reconcilable with *N. Y. State Loan etc. Co. v. Helmer*, 77 N. Y. 71, is, however, questionable. The action there was upon a note discounted for defendant, by plaintiff. The defense relied upon was that the note had been discounted by plaintiff while engaged in a banking business, in violation of its charter and of the laws of the state. Upon demurrer, the answer was held good. The court, in attaining this result, laid stress upon a provision in the revised statutes of the state, that no corporation, "not expressly incorporated for banking purposes, shall, by any implication or construction, be deemed to possess the power to discount bills, notes," etc., and certain other provisions in the revised statutes of similar import. The court reviews the principal case and certain others of the same character, and after attempting to distinguish them from the principal case, upon the ground that the case is different where the contract is sought to be enforced against the corporation from that where it is the latter that seeks its enforcement, concludes its opinion as follows: "None of these cases, I think, affect the question which arises upon this appeal; and if any of them can be regarded as adverse to the views expressed, they are overborne by the adjudications already cited, which uphold a contrary doctrine. That the notes were discounted without any authority of law, and in the very teeth of the statutes, can not be denied; and the facts as presented by the answers, do not bring the case within that class of decisions, where the party, having received the benefit of a contract, is not allowed to repudiate it, because the other party had no power to make it. Such cases rest upon the principle that the contract was an innocent or lawful one, and, in this respect, differ from a case where the act was illegal, and expressly prohibited by law."

THE WORD "PERSON" IN A STATUTE INCLUDES CORPORATIONS: *Ahern v. National Steamship Co.*, 8 Abb. Pr. (N. S.) 285; *Cary v. Marston*, 56 Barb. 29; *United States Telegraph Co. v. Western Union Telegraph Co.*, Id. 53.

DECLARATION UPON CONTRACT required to be in writing, by the statute of frauds, need not allege that the contract is in writing: *Dewey v. Hoag*, 15 Barb. 368; *Livingston v. Smith*, 14 How. Pr. 493.

FOREIGN GOVERNMENT MAY SUE in the state courts: *Republic of Mexico v. Arrangois*, 11 How. Pr. 6.

HALL ET AL. v. TUTTLE.

[6 HILL, 38.]

FORMAL ENTRY OF JUDGMENT MAY BE MADE AT ANY TIME; and a justice or magistrate may be allowed to draw up or to amend a record of conviction, for his own protection, after he has committed the party convicted, or after *certiorari* has issued, requiring him to make a return of his proceedings.

THOUGH STATUTE REQUIRE JUDGMENT TO BE FORTHWITH RENDERED and entered, upon the return of a verdict, a judgment rendered in due time will not be reversed because not entered in the docket until two or three days thereafter.

WATSON v. DAVIS, 19 WEND. 371, EXPLAINED.

CERTIORARI. Tuttle had sued Hall and others before a justice of the peace. At the trial, May 8, 1842, the jury returned their

verdict. The justice thereupon at once rendered judgment, in conformity with the verdict, against Tuttle; entered the judgment and verdict in his minutes, but did not transcribe them into his docket until two or three days afterwards. The common pleas reversed this judgment; and thereupon Hall and the others sued out a writ of error.

J. Benedict, for the plaintiffs in error.

J. M. Muscott, for the defendant in error.

By Court, COWEN, J. The only ground on which the common pleas reversed the judgment was the omission of the justice to enter it in his docket until after the lapse of two or three days from the time the verdict was pronounced. There may be some question whether the return sufficiently negatives the judgment being entered in the docket forthwith; but admitting that it does, is the omission such an error as calls for the reversal of the judgment and other proceedings? Immediately on the verdict being rendered, the justice entered it with the judgment in his minutes, which contained all the proceedings, and were kept on file. He thinks they were not transcribed into his docket till two or three days after.

Independently of the statute, the case would not be attended with the least difficulty. The law itself declares what the judgment shall be on a verdict being found by a jury, or by a justice acting in the place of a jury. And though the court in declaring the judgment may word it wrongly, the law will regard the declaration as it should be, and make it inure accordingly for all purposes: *Ehwell v. McQueen*, 10 Wend. 519, 521-523, and the cases there cited. This shows the formal entry of the judgment to be quite an unimportant matter; and where it is necessary for the purposes of evidence, it may be made at any time. This is so, even where a full record of conviction is necessary: *Massey v. Johnson*, 12 East, 67, 81, 82. In the case cited, the magistrate was allowed to draw up a record for his own protection, after he had committed the party.

The same point was held in *Gray v. Cookson*, 16 East, 13, 20, the record being drawn up after the commencement of an action, and some six months after the judgment rendered. So in respect to a return to a *certiorari* brought on the ground of informality, the justice may, for the purpose of sustaining the proceeding, draw out an amended entry according to the fact, more formal and perfect than the first: *The King v. Barker*, 1 East, 186, 188. Lord Kenyon, C. J., here said: "If the magis-

trate has done no more than return the conviction in a more formal shape, instead of sending it up in the informal manner in which it was first drawn, and supposing that the facts, as they really happened, will warrant him in the return he has now made, the contrary of which is not imputed, I am of opinion that it was not only legal but laudable in him to do as he has done, and he would have done wrong if he had acted otherwise. It is a matter of constant experience for magistrates to take minutes of their proceedings, without attending to the precise form of them at the time when they pronounce their judgment, to serve as memorandums for them to draw up a more formal statement of them afterwards to be returned to the sessions; and it is by no means unusual to draw up the conviction in point of form after the penalty has been levied under the judgment. Nor is there any legal objection to this method, provided the facts will warrant them in stating what they do. It is no answer to say, that a party convicted may be thereby induced to incur an unnecessary expense in suing out a *certiorari*, to get rid of an informal conviction; for a mere informality in the manner of drawing up the conviction, ought not to be the inducement for removing it into this court, but some substantial defect in the justice and legality of the proceeding." *Vide* also *Sekwood v. Mount*, 9 Car. & P. 75. In *Matthews v. Houghton*, 2 Fairf. 377, the justice had continued the cause on his docket to August 1, 1828, without indicating either verdict or judgment. He then went out of office, and, three or four years after, wrote up the book to judgment. Mellen, C. J., said: "A magistrate does not act judicially in making up and completing his record. In doing this he performs himself what this court does through the agency of their clerk. It is a mere ministerial act. The justice adjourned to August 1, 1828, on which day he made his decision." The proceeding was held to be irregular. In the case at bar the original minutes were made *pari passu* with the progress of the cause, and the whole transcribed into the docket within two or three days. The objection is hypercritical in the extreme, and what the common law would, as we have seen, have entirely disregarded.

The defendant in error is therefore driven to a reliance on 2 R. S. 177, sec. 124, 2d ed., which directs that in certain cases, one of which is that of a verdict, the justice shall forthwith render judgment, and enter the same in his docket. Was the omission to copy the notes into the docket such a judicial error, as vitiated the whole proceeding? I should think most clearly

it was not. The case of *Watson v. Davis*, 19 Wend. 371, the only case relied on, turned upon a principle entirely different. When the cause is heard by the justice himself, he must terminate his judicial labor in the matter within four days. Mr. Justice Bronson says, the amount was not settled in the mind of the justice until the four days had elapsed. Of course it was not entered in the docket till after that time. The provision as to the docket is incidentally mentioned in reciting the statute; but the emphatic ground was the omission to decide. There can be no judgment even by legal implication, neither in substance nor in form, till a judicial conclusion is made by the justice. This is a condition, the execution of which being limited to four days by the very statute which confers the power to render judgment, it is at least error, if not more, to pass the time. It is truly said that the statute is in terms equally imperative as to the entry of the judgment upon the docket; and in the case before us it directed that the judgment should be entered forthwith. But the nature of the proceeding is, as we have seen, entirely different in the two cases. Here it was merely ministerial and formal. All judicial action had been completed. The verdict was rendered and the judgment followed. Both the law and the magistrate concurred in the proper action upon the verdict, within the proper time, and the judgment itself was entered. The statute is equally peremptory in respect to all the entries on the docket. "Every justice, etc., shall keep a book, in which he shall enter," etc., specifying fifteen particulars, some before and some after judgment: 2 R. S. 195, 196, sec. 243, 2d ed. Six of them are after judgment, beginning with the entry of the judgment. Suppose any or all to be omitted; or even no book to be kept. The whole is ministerial; and the statute touching the docket and its minutiae merely directory. Its language being imperative does not make it anything more. Almost every directory statute is imperative in its words. One entry is of the execution; another of the return, etc. The statute peremptorily commands these entries. Yet it would be a strange application of it, should we hold the judgment reversible for the omission of either. The entry of the judgment is no more a part of it than the instances put. It is mere evidence of the judgment, as it was at common law; valid, though made at any time, and open to correction according to the truth. To say that a clerical defect or omission in any of the fifteen docket particulars, should be ground of reversal would be intolerable. How far does it accord with another provision (*Id.* 185, sec.

181) directing the court, on *certiorari*, to give judgment as the right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings, which do not affect the merits?

On the whole, we are of opinion that the judgment of the common pleas must be reversed, and that of the justice affirmed.

Judgment reversed.

STATUTE DIRECTING THE ENTRY OF JUDGMENT by a justice of the peace upon his docket, to be made within a certain period of time, imposes but a ministerial duty upon him that may be performed after the expiration of the period, without the judgment being thereby avoided. Indeed, the cases go further than this. For where the docket shows everything necessary to base a judgment for one of the parties, an execution may issue in his favor, though the docket fail to show any actual entry of judgment: *Stephens v. Santee*, 49 N. Y. 39, reversing same case, 51 Barb. 532. In this case the entry upon the docket of the justice relative to the proceedings in the case after the jury had retired was as follows: "By consent of the parties the jury retired, without being in charge of a constable, and brought in a verdict in favor of the plaintiff and against the defendant, for damages, one hundred and seventy-five dollars; justice's costs, six dollars; court cost, one dollar and twenty-five cents; plaintiff cost, one dollar; total, one hundred and eighty-three dollars and twenty-five cents. February, 3, 1862, trans. given, fifty cents. Received the costs in the above suit and notice of appeal, and two dollars for return for plaintiff. L. P. Weed, J. P." It will be seen by this that no entry of judgment appeared upon the docket. To the same effect, *Fish v. Emerson*, 44 N. Y. 379; *Bradner v. Howard*, 75 Id. 420; *Griswold v. Haven*, 25 Id. 595; *Robbins v. Gorham*, 26 Barb. 588. But see *Nellis v. Turner*, 4 Denio, 553. There no formal judgment had been entered upon the docket; but it appeared therefrom that a plea in abatement had been adjudged upon demurrer to be sufficient, and the justice had thereupon discharged the defendant from arrest, and had indorsed upon the docket the amount of his costs; yet it was held that there was no judgment which might either be affirmed or reversed; and see *Dorr v. City of Troy*, 19 Hun, 226. Because of the duty of the justice to make entry of judgment being ministerial, he will be liable in damages to any one who has been injured by reason of his mistake in making the entry. Thus where judgment for defendant was entered by mistake as judgment for plaintiff, and the former was obliged to pay its amount, he was allowed an action against the justice: *Christopher v. Van Lieu*, 57 Barb. 29.

A FAILURE TO ENTER AN ORDER of the court of sessions directing that the trial of an indictment shall go over to the next court of oyer and terminer, upon the minutes at the session that it is made, has been held not to avoid it: *People v. Myers*, 2 Hun, 28; S. C., 4 Thomp. & C. 296. All the above cases cite the principal case.

JUSTICE MUST RENDER JUDGMENT IMMEDIATELY upon the rendering of a verdict by the jury, and if he fail in this his judgment is void. Thus, where the entry upon the docket of costs, for the recovery of which the judgment went, was made several days after the verdict was rendered, the judgment was reversed: *Smith v. Briggs*, 3 Denio, 73.

STATUTE FURNISHING NEW REMEDY does not take away the common law remedy, if its terms are merely affirmative: *Hardman v. Bowen*, 5 Abb. Pr. (N. S.) 330.

BAKER v. BRAMAN.

[6 HILL, 47.]

OWNER OF LAND MAY CONSENT TO AN UNCONSTITUTIONAL LAW, and become bound by its provisions. The consent need not be in writing. It was, therefore, held that by bringing an action for damages awarded him under a statute authorizing the laying out of private roads, the land owner adopted the statute and removed all obstacles to its operation.

ASSUMPSIT MAY BE MAINTAINED upon an award or assessment of a sum to be paid to plaintiff by defendant.

ASSUMPSIT for damages assessed in favor of plaintiff for a private road laid out through his lands, on the application of defendant. Defendant demurred: 1. On the ground that the statute authorizing the laying out of private roads was unconstitutional, and there was, therefore, no consideration to support any promise in favor of plaintiff; and 2. That *assumpsit* was not the proper remedy, etc.

S. Beardsley, for the defendant.

J. A. Collier, for the plaintiff.

By Court, COWEN, J. The case of *Taylor v. Porter*, 4 Hill, 148 [*ante*, 274], held the statute authorizing one man to take the property of another for his own use, though under an appraisal of its value, to be void. The action was trespass *quare clausum fregit* by the owner; and a justification was pleaded without averring the plaintiff's consent. The decision proceeded on the ground that the land was taken *in invitum*; and Mr. Justice Bronson concedes in terms that the objection has no application where the owner consents. It was thrown out in the course of the argument of the present case that such consent not being in writing, the title would still be void under the statute of frauds. The answer is that the owner's consent takes away all objection to the statute in relation to private roads. True, the road being an incorporeal hereditament, it could not be granted even at common law without a deed. But it was competent for the legislature to create an exception both to the common law rule and the statute of frauds. They have done so by the statute in question. In the light of the constitution, if not that of a law which lies at the foundation of all governments, this statute must be read with the proviso that the owner consent. That consent removes all obstacles and lets the statute in to operate the same as if it had in terms contained the condition. Clearly we may say of a statute as much as we do every day of deeds and other private acts, *valeat quantum valere potest*.

By bringing an action for the damages assessed, we have the clearest manifestation of consent; and an adoption of the machinery provided by the statute for effectuating the grant. The provision of the fundamental law was for the benefit of the owner only; and the maxim, *quilibet potest renunciare juri pro se introducto*, applies as well to constitutional law as to any other. Suppose the defendant omits to plead *autrefois acquit* to an indictment for an infamous crime, or pleads guilty, could it be said that the former acquittal should protect him from punishment, because the provision against his being put twice in jeopardy has happened to find its way into the constitution? See 2 Inst. 183.

It is clearly settled that an award or assessment of a sum to be paid by one to another, pursuant to a public or private act of parliament, forms the subject of an action of *assumpsit*. The case of *Bell v. Burrows*, reported in Bull. N. P. 129, Lond. ed. of 1788, is in point, and has never been questioned, at least not directly. Debt may, for aught I know, be equally proper; but that action is often concurrent with *assumpsit*: See *Rann v. Green*, Cowp. 474; also Doug. 402. A justice's judgment is perhaps an exception: *Pease v. Howard*, 14 Johns. 479. But clearly the analogy of this to an assessment should not operate to enlarge it into a general rule. Such an effect would place it in conflict with doctrines that this court could never have thought of disturbing.

Judgment for the plaintiff.

A PARTY MAY ALWAYS WAIVE a statutory or even a constitutional provision in his own favor affecting simply his property or alienable rights: *Phyfe v. Eaner*, 45 N. Y. 104; *Anderson v. Reilly*, 66 Id. 192; *Detmold v. Drake*, 48 Id. 324; *Baird v. Mayor*, 74 Id. 386; *Schuchardt v. Mayor etc. of N. Y.*, 53 Id. 210; *Conkling v. King*, 10 Id. 446; *People v. Lawrence*, 41 Id. 140; *People v. Brennan*, 6 Thomp. & C. 126; 3 Hun, 673; *People v. Williams*, Id. 341; *Keator v. Ulster & Delaware Plank Road Co.*, 7 How. Pr. 42; *Regua v. Holmes*, 19 Id. 444; *Bucklin v. Chapin*, 35 Id. 161; S. C., 53 Barb. 493; *Miller v. Garlock*, 8 Id. 157.

The waiver may be by parol or in *pais*, as by the acceptance of money, though it operate the transfer of an estate in lands, for the statute of frauds will not apply to such a case: *Tucker v. Rankin*, 15 Barb. 480; *Dempsey v. Kipp*, 62 Id. 314; *Sherman v. McKeon*, 38 N. Y. 275; S. C., 8 Bosw. 111; *Bartow v. Draper*, 5 Duer, 137; *Embury v. Conner*, 3 N. Y. 518.

A party may also waive a constitutional provision affecting his personal rights when no considerations of public policy forbid. Thus after a challenge to the array has been sustained, the prisoner may waive the challenge and submit to be tried by the jury: *Pierson v. People*, 79 N. Y. 429.

CASES
IN THE
COURT FOR THE CORRECTION OF
ERRORS
OF
NEW YORK.

STALKER v. McDONALD ET AL.

[6 HILL, 93.]

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, upon questions arising under the constitution, laws, and treaties of the United States, will be followed in this court; but in questions of local law, and in construing the constitution and statutes of this state, the decisions of the courts of this state will be followed in preference to those of the United States. On questions of commercial law, uniformity of decision between the different state and national courts is highly desirable.

CODDINGTON v. BAY, 11 AM. DEC. 342, examined and approved.

BONA FIDA HOLDER OF NEGOTIABLE PAPER, acquired for a valuable consideration, and without notice of, or reasonable ground to suspect, any defect in the title of the person from whom he received it in the ordinary course of business, is entitled to protection, to the extent, at least, of the consideration paid therefor.

HOLDER OF NOTE WHO TOOK IT IN PAYMENT, OR AS SECURITY FOR THE PAYMENT, OF AN ANTECEDENT DEBT, without parting with anything of value, can not hold it against a prior equitable owner; and in the event of his having paid a part of its value, he is treated as a *bona fide* holder to the extent of such payment only.

BONA FIDA HOLDER FOR A VALUABLE CONSIDERATION.—Various cases tending to show the signification of these words cited and discussed. *Swift v. Tyson*, 16 Pet. 1, disapproved.

TROVER by McDonald and others against Stalker, to recover for the conversion by him of two promissory notes. These notes had been delivered to Gillespie and Edwards for McDonald and his co-plaintiffs, and the latter were entitled to recover unless Stalker had obtained a paramount title by reason of a transfer to him made by Gillespie and Edwards. He held a

note against them which he had deposited in bank for collection, but which he was prevailed upon to withdraw upon their delivering to him the notes in controversy as security for its payment. He had every reason to suppose them to be the owners of the notes. After this transaction Gillespie and Edwards paid one or more notes at bank in the regular course of business, but they soon stopped payment and became insolvent. The notes thus transferred to Stalker were paid to him at maturity. The instructions of the trial court were to the effect that if the notes were transferred to secure a pre-existing debt, Stalker was not entitled to hold them. Verdict and judgment for plaintiffs, for the amount of the notes. Stalker sued out a writ of error.

J. W. Gerard, for the plaintiff in error.

D. Lord, jun., for the defendants in error.

WALWORTH, Chancellor. The object of this writ of error appears to be to induce this court to overrule its decision in the case of *Coddington v. Bay*, 20 Johns. 637 [11 Am. Dec. 342], and to make our decision conform to the opinion of Mr. Justice Story, in the recent case of *Swift v. Tyson*, 16 Pet. 1, decided by the supreme court of the United States. Upon questions arising under the constitution and laws of the United States, and upon the construction of treaties, the decisions of that high tribunal are binding upon the state courts; and we are bound to conform our decisions to them. But in questions of local law, and in the construction of the constitution and statutes of the state, the decisions of the highest court of judicature of the state are the evidence of what the law of the state is; and are to be followed in preference to those of any other state or country, or even of the United States. On a question of commercial law, however, it is desirable that there should be, as far as practicable, uniformity of decision, not only between the courts of the several states and of the United States, but also between our courts and those of England, from whence our commercial law is principally derived, and with which country our commercial intercourse is so extensive. I have, therefore, thought it my duty to re-examine the principles upon which the decision of this court, in *Coddington v. Bay*, was founded, notwithstanding it was deliberately made, with the concurrence of at least one of the ablest judges who has ever adorned the bench of this state, and has been acquiesced in and followed by all the courts of the state for more than twenty years. And I have done it not only out of respect to the decision actually made by the su-

preme court of the United States in the case alluded to, but also because the opinion of the distinguished judge who pronounced its decision, is of itself entitled to very great weight upon a question of commercial law; although what he said in that case respecting the transfer of a negotiable note as a mere security for the payment of an antecedent debt, was not material to the decision of any question then before the court, and is therefore not to be taken as a part of its judgment in that case.

In *Coddington v. Bay*, this court did not, so far as I have been able to discover, run counter to any decision which had ever been made in this state or in England previous to that time. For the decision admits that the *bona fide* holder of negotiable paper, who has received it for a valuable consideration, without notice or reasonable ground to suspect a defect in the title of the person from whom it was taken in the usual course of business or trade, is entitled to full protection. But that where he has received it for an antecedent debt, either as a nominal payment, or as a security for payment, without giving up any security for such debt which he previously had, or paying any money or giving any new consideration, he is not a holder of the note for a valuable consideration, so as to give him any equitable right to detain it from its lawful owner. This principle of protecting the *bona fide* holder of negotiable paper who has paid value for it, or who has relinquished some available security or valuable right on the credit thereof, is derived from the doctrines of the courts of equity in other cases where a purchaser has obtained the legal title without notice of the equitable right of a third person to the property. It has been uniformly held by the courts of equity in such cases that the purchaser who has obtained the legal title as a mere security or payment of a pre-existing debt, without parting with anything of value, is not entitled to hold the property as against the prior equitable owner. And if he has paid but a part of the consideration, or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*. This last principle was applied by one of the courts in England to the purchaser of a negotiable note, where the indorser of a note for one hundred pounds, by his replication to the plea that it was indorsed to him without consideration, stated that it was indorsed to him for the consideration of forty-nine pounds; and he was only permitted to recover that amount against the defendant, from whom the note had been obtained by the indorser without consideration: *Edwards v. Jones*, 7 Car. & P. 633.

It is somewhat singular that Mr. Justice Story should rely upon the opinion of Chancellor Kent, in the case of *Bay v. Coddington*, 5 Johns. Ch. 54 [11 Am. Dec. 342], as evidence that the decision of this court sustaining his opinion, and affirming his decree in the same case, was a departure from the law of this state, as previously settled. And the previous case of *Warren v. Lynch*, 5 Johns. 239, is not in conflict with the decision of this court; nor does it decide that a pre-existing debt is a sufficient consideration to protect the holder of a negotiable note which was not valid as between the original parties, against the equitable rights of the maker of the note, or against the rights of a previous owner. For the note in that case was given by Lynch for a valid and subsisting debt by the one to whom the debt originally belonged. Although it was taken in the name of another person, that person indorsed it in blank, for the purpose of enabling the person to whom the debt belonged to negotiate it; and it was then transferred to the plaintiff, immediately, for aught that appears, partly in payment or security of a pre-existing debt. The question then arose, whether other creditors of the former owner of the note were not entitled to it, as being still the property of Rose, the original owner, or of Robertson, the indorser. What is said, therefore, as to the pre-existing debt, is merely as to its being a sufficient consideration as between the plaintiff and Rose, from whom the plaintiff received the note. For if the transfer was valid as between them, the creditors of Rose, who were also endeavoring to obtain payment of a pre-existing debt merely, acquired no right to the money due on the note, by their subsequent suit in the nature of a foreign attachment in the state of Virginia. The case of *Birdseye v. Ray*, 4 Hill, 159, cited by the plaintiff's counsel on the argument, is a case of the same character. For both claimants in that case were endeavoring to obtain preference in payment of pre-existing debts. And the court decided, that one of them, who had secured a specific lien upon the property by purchase from the owner, before the other creditor's execution was actually levied thereon, was entitled to hold it as against the execution, under the provision of the statute on that subject. In other words, that, as between creditors having equal equities, the debtor may lawfully prefer one to the other, before an actual levy upon his property has been made.

There is no doubt that the cases of *Wardell v. Howell*, 9 Wend. 170; *Rosa v. Brotherson*, 10 Id. 85; *Ontario Bank v. Worthington*, 12 Id. 593; and *Payne v. Cutler*, 13 Id. 605, in the supreme

court of this state, and of *Francia v. Joseph*, 3 Edw. Ch. 182, before the vice-chancellor of the first circuit, follow the decision of this court in the case of *Coddington v. Bay*. And they fully establish the principle, that to protect the holder of a negotiable security which has been improperly transferred to him in fraud of the prior legal or equitable rights of others, it is not sufficient that it has been received by him merely as a security or nominally in payment of a pre-existing debt, where he has parted with nothing of value, nor relinquished any security upon the faith of the paper thus improperly transferred to him without any fault on his part. I may also add, that many other decisions to the same effect have been made in this state, in the different courts of law and equity, within the last twenty years, although most of them have not been reported.

It is supposed, however, by the learned judge who delivered the opinion of the supreme court of the United States in the case before alluded to, that this strong column of decisions, supported as it is by the decree of Chancellor Kent in the case of *Bay v. Coddington*, by the opinions of Chief Justice Spencer and Justices Woodworth and Platt in that case, and by every judge who has occupied a seat upon the bench of the supreme court since 1822, has been greatly shaken if not entirely overturned by two recent decisions of the supreme court. That the judges who made those two decisions do not themselves so understand them, however, is evidenced by the fact that they have given judgment in the case now under consideration, in conformity with the principle of the decisions which they are supposed to have overruled. And I have not been able to discover anything in the opinions of the court, as reported, in the cases of *Bank of Salina v. Babcock*, 21 Wend. 499, and *Bank of Sandusky v. Scoville*, 24 Id. 115, which necessarily conflicts with any previous decision of the supreme court upon the question now under consideration. In the first case, the note was discounted at the bank in the ordinary way. And the proceeds thereof were applied, by the authority of the persons for whom it was discounted, to pay up and cancel three other notes which were then due to the bank; upon two of which notes, amounting to nearly the whole of such proceeds, there was a responsible indorser. The court held that the effect of the transaction was the same as if the parties for whose benefit the note was discounted had actually received the money therefor, and had afterwards applied it to pay and discharge the notes then due; and that the indorser upon those notes was discharged from his liability.

In the second case, the question arose under the usury law as contained in the revised statutes, which protects usurious notes in the hands of an indorsee or holder who shall have received the same in good faith, and for a valuable consideration: 1 R. S. 172, sec. 5. And the court considered the transaction the same as though the money had been actually paid to the person for whose benefit the usurious note was discounted, and he had then applied it in payment of the former note; so that the original indebtedness was extinguished, and the bank had no other remedy to recover their money except upon the note which was alleged to have been originally tainted with usury. The question in that case was, whether the transaction was equivalent to an actual payment of the money for the usurious note, so as to make the bank a *bona fide* holder for a valuable consideration; and not whether giving the note for a pre-existing debt was a payment of value. Under a similar provision in the English statute it has been decided that a negotiable note tainted with usury was invalid in the hands of an innocent party, who had merely taken it in payment of an antecedent debt: *Vallance v. Siddel*, 2 Nev. & P. 78. There is nothing in the reports of our own state then, which is in conflict with the principle established in *Coddington v. Bay*, in this court, that, to protect the holder of a negotiable security which has been passed to him in fraud of the rights of others, he must not only have taken it without notice, but must also have parted with something of actual value, upon the credit or faith thereof; and that merely receiving it in security or payment of an antecedent debt, where by the settled rules of equity he would not be protected as a *bona fide* purchaser of property in other cases, is not sufficient.

Nor have I been able to find an actual decision in the English reports which is in conflict with the uniform course of decisions on this subject in this state. On the contrary, the English judges, when speaking on this subject, generally use the words valuable consideration, in contradistinction from a mere valid or sufficient consideration as between indorser and indorsee. And that receiving the note in payment or security of a pre-existing debt merely, is not understood as receiving it for a valuable consideration, in legal language, is evident from the decision of the case of *Vallance v. Siddel*, to which I have just referred.

I think the learned judge was under a mistake in supposing that this question arose in England, and was decided in the case of *Pillans v. Van Mierop*, 3 Burr. 1663. That was a suit brought against defendants who had actually agreed with the plaintiffs

to honor their drafts for money previously advanced by them to a third person. And the only question was, whether the indebtedness of a third person was a sufficient consideration for the written promise of the defendants to accept the bills on his account. One of the earliest English cases upon the question which we are considering, is the anonymous case before Chief Justice Holt, in 1698; where a bank-note payable to bearer was lost, and the finder passed it for a valuable consideration. In an action of trover brought by the loser against the person to whom it was thus passed, his lordship decided that the action did not lie against the defendant, because he had the note for a valuable consideration: *Anonymous*, 1 Ld. Raym. 738; S. C., 1 Salk. 126. The next in order of time was the case of *Ex'rs of Devallar v. Herring*, in 1727, 9 Mod. 45, where an annuity ticket was lost or stolen, and, after passing through several hands, came to Herring, the defendant, who purchased it for a valuable consideration. And it was decided that he was entitled to it, upon the ground that it had come to his hands *bona fide*, and for a valuable consideration. In *Haly v. Lane*, 2 Atk. 181, which came before Lord Hardwicke in 1741, he thus lays down the rule: "Where there is a negotiable note, if it comes into the hands of a third or fourth indorsee, though some of the former indorsees might not pay a valuable consideration, yet if the last indorsee gave money for it, it is a good note as to him; unless there should be some fraud or equity against him appearing in the case." The same principle of protecting the holder of a negotiable instrument, if received by him in the course of trade, and for a valuable consideration, was recognized in the opinion of the court of kings bench in 1753, while Chief Justice Lee presided in that court: *Maclish v. Elkins*, Say. 73. Then followed the case of *Miller v. Race*, 1 Burr. 452, before Lord Mansfield and his associates in 1758, where a bank-note was stolen from the mail and came into the hands of the plaintiff, as the report states, for a full and valuable consideration, in the usual course and way of his business, and without any notice or knowledge that it had been taken from the mail; but, upon presenting it at the bank for payment, it was detained by the defendant, who was a clerk therein. And the decision of the court was in conformity with what is now understood to be the settled law, both in that country and in this. But that Lord Mansfield understood the holder must have given a valuable consideration for the note to entitle him to protection, is evident from what is said in his opinion in answer to a case cited by the defendant's counsel as having been

decided by Lord Holt in 1700. In reference to that case, he says: "But Lord Chief Justice Holt could never say that an action would lie against a person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and *bona fide* paid to him, even though an action was brought by the true owner; because he had determined otherwise but two years before; and because bank-notes are not like lottery tickets, but money." And the words "for a valuable consideration," as well as "*bona fide* paid to him," are italicized in the opinion of Lord Mansfield, to show that both are material and necessary to protect the holder of a note against the claim of the former owner thereof.

This is also in accordance with what he actually did in the case of *Grant v. Vaughan*, 1 Wm. Bl. 485; S. C., 3 Burr. 15, 16, which was tried before him six years afterwards. There a bill of exchange, payable to bearer, was lost, and was found by a stranger to the plaintiff, who gave it to the plaintiff upon the purchase of a parcel of teas, and received the change, after the plaintiff had made inquiry and ascertained that the drawer of the bill was a responsible person. And Lord Mansfield submitted it to the jury to decide, 1. Whether the plaintiff came by the bill *bona fide* for a valuable consideration? and 2. Whether such bills, payable to bearer, were negotiable? The jury having found a verdict for the defendant, a new trial was granted; not upon the ground that the first direction was wrong, but because his lordship had erred in submitting the question as to the negotiability of such a bill to the jury, as a question of fact. And in answering the objection raised by counsel to the negotiability of drafts payable to bearer, that it would be dangerous, because upon a casual loss the finder might maintain an action upon them as bearer, he again says, "But the bearer must show it came to him *bona fide* and upon valuable consideration." The next case was that of *Peacock v. Rhodes*, 2 Doug. 633, which came before the same court in 1781, while Lord Mansfield still presided there. In that case a suit was brought against the drawers of a bill which had been indorsed in blank and was stolen, and had been passed to the plaintiff by a stranger professing to be the owner thereof, for its value, in payment of cloth and other articles in the way of the plaintiff's trade as a mercer, and partly for cash. And the case was decided in conformity with the previous decisions. But I do not find an intimation in this, or in either of the previous cases, that if the person who received the note or bill had merely taken it in pay-

ment or security of an antecedent debt, without having parted with anything of value on the credit or faith thereof, he would have been entitled to hold the note or bill against the former rightful owner. On the contrary, we may infer what Lord Mansfield's opinion would have been upon the question of applying it in payment of a precedent debt, from what he actually decided in 1777, in the case of *Buller v. Harrison*, Cowp. 565. There, money had been paid to an agent under a misapprehension of facts, and had been passed by him to the credit of his principal, in satisfaction of a previous indebtedness, before he had any notice or suspicion that the money was not justly and equitably due to such principal. And his lordship decided that the agent must refund the money, and resort to his principal to recover what was due to him before the money was so applied; that as no new credit was given he had not been legally prejudiced; and that applying the money to pay the precedent debt was not equivalent to paying it over to his principal before he had notice of the plaintiff's equitable rights.

In the case of *Collins v. Martin*, 1 Bos. & Pul. 648, which came before the court of common pleas in England in 1797, the bills had been pledged by the plaintiff's bankers with the defendants upon an advance of money thereon. The only question there was, whether a banker with whom a negotiable security had been deposited for collection could pledge it to a *bona fide* holder, for money advanced to him on the credit thereof. And it was decided he could. But in that case the principle is again recognized that to protect the holder of a negotiable instrument against the former owner, where it has been fraudulently transferred, he must be a holder thereof for value. For Chief Justice Eyre says, "if it can be proved that the holder gave no value for the bill, then indeed he is in privity with the first holder, and will be affected by everything which would affect the first holder." And in the case of *Lowndes v. Anderson*, 13 East, 130, which was decided in 1810, the question was, whether the defendants, who gave up a valid security which had been remitted to them in payment of a balance and to meet acceptances for a bankrupt, were answerable to his assignees for money and bills which they had received from a stranger in payment of such security, although it turned out afterwards that such money and bills belonged to the bankrupt; but which fact was concealed from their knowledge by the secret agent employed by him to transact the business. In that case again, the necessity of a valuable consideration is recognized by Ellen-

borough, C. J. For in delivering the opinion of the court, he says: "It would be a grievous inconvenience if bank notes could be followed, in the manner now attempted, through the hands of *bona fide* holders for a valuable consideration without notice."

I have carefully examined the several subsequent cases relied upon in the opinion of Mr. Justice Story in *Swift v. Tyson*, 16 Pet. 1, to show that the decisions of the courts in England are in conflict with the settled law of this state upon the question now under consideration; and as I understand those cases, only two of them, and these by implication merely, conflict in any degree with our decisions. I believe I have also examined every reported decision on the subject, down to the present time, in the English reports which have reached this country; though it is possible that some have escaped my researches. And I do not find another case, or *dictum*, in hostility to the principle as settled by this court in the case of *Coddington v. Bay*. The English cases subsequent to 1810, referred to by Mr. Justice Story as containing a contrary doctrine, are the cases of *Bosanquet v. Dudman*, 1 Stark. 1; *Ex parte Bloxham*, 8 Ves. 531; *Heywood v. Watson*, 4 Bing. 496; *Bramah v. Roberts*, 1 Bing. N. Cas. 469; and *Percival v. Frampton*, 2 Crompt. M. & R. 180. In the first case it is evident there is a typographical error in substituting the word but for who, in the fifth line of the statement of the case by the reporter. The suit was brought by the indorsees of a bill drawn by Rains upon the defendant, payable to his own order, and indorsed by him; and which had been accepted by the defendant. Clarkson & Co., who were the owners of the bill, and who kept an account with the plaintiffs' bankers in London, deposited the bill with them as collateral security for such acceptances as they might make. And at the time the bill became payable, on the fifth of February, 1812, the plaintiffs were the holders of it, and had at that time accepted bills to a much larger amount than the cash balance in their hands. They were therefore undoubtedly entitled to hold it as against Clarkson & Co. for the excess of such acceptances beyond the cash balance. But as they held other collateral securities to a considerable amount, when this bill was dishonored they returned it to Clarkson & Co.

They subsequently remitted it again to the plaintiffs, requesting them to hold it for Clarkson & Co., and to place the same to their account when paid; and the plaintiffs continued to hold the bill until Clarkson & Co. became bankrupts. Upon the trial

of the cause the defendant's counsel was proceeding to cross-examine the witness as to the comparative amount of the cash balance and collateral securities, and the amount of the acceptances on account of Clarkson & Co. at the time the bill fell due; with a view, I presume, to show that the cash and other collateral securities were more than enough to meet all their acceptances, and that they had no lien upon this particular bill at that time, but that it belonged to Clarkson & Co. And it was in reference to that cross-examination, as I understand the case, that Lord Ellenborough said he should hold that where collateral securities were placed in the hands of a banker, under such circumstances, all the collateral securities were held for value, whenever acceptances should be made from time to time, upon the credit and faith of such collateral securities, beyond the cash balance in the hands of the bankers. In other words, that it was immaterial how much the collateral securities amounted to. For if the acceptances which had thus been made on the faith of them, exceeded at any time the cash in hand to meet such acceptances, the bankers were holders of all the collateral securities for value, to secure the payment of the deficiency; and neither the depositors nor their assignees in bankruptcy could claim a return of any part of such securities, or prevent the bankers from collecting the money on them, to meet such deficiency. This was unquestionably good law, and is not a decision that, where a bill is fraudulently deposited with a banker in payment or security of a pre-existing debt, he is a *bona fide* holder thereof for value, as against the party defrauded. And if the remark of his lordship in that case meant anything else, it is impossible to tell from the report what he did mean. For there was no claim or pretense that the bill in question did not belong to Clarkson & Co. at the time it was deposited with the plaintiffs and when it fell due; although as between Rains, the drawer and indorser, and the defendant, the acceptor, it was a mere accommodation bill. Whether his lordship was right in holding that the return of the bill to the plaintiffs, after it was dishonored and had been paid to Clarkson & Co. by the drawer, who was in equity bound to pay it, restored the plaintiffs to all their former rights as against the accommodation acceptor, is an entirely different question. And if the reporter is right in his statement of the facts, I think I should have decided, in such a case, that the plaintiffs could not recover against the accommodation acceptor or against Rains the drawer; even if they had paid the whole amount of

the dishonored bill, in money, to Clarkson & Co., upon the return thereof. Nothing further, however, is necessary to be said, in reference to this very imperfectly reported case, than that it decides nothing upon the question now under consideration.

In *Ex parte Bloxham*, Lord Eldon merely decided that where bills and securities are remitted to a banker, by his customer, to meet acceptances which the banker may make from time to time for his customer, such banker, as between him and his customer, has a general lien thereon for the amount of his acceptances for the customer. And that though some of the acceptances had not become due at the time the customer became a bankrupt, the banker was entitled to prove, under the commission, the amount for which he was liable upon the acceptances for the bankrupt. But that in making such proof to cover the acceptances, the proof must be made on the securities upon which the bankrupt's name appeared, and not upon a cash balance against the bankrupt which did not exist until after the bankruptcy. If there is anything in that decision which has the least bearing upon the question now under consideration, I am not able to discover it.

In *Heywood v. Watson*, the defendant and Morrall were co-partners, and obtained permission to overdraw their account with the plaintiffs, their bankers, from time to time to the extent of two thousand pounds; for which amount Morrall gave his promissory note to the plaintiffs as collateral security. The next day he received from the defendant, his partner, a note payable to himself or order, for one half of that amount, to meet his note as collateral security to the plaintiffs for their advances, and to secure to him the repayment of the defendant's moiety of such advances, or so much as he should individually have to pay the plaintiffs on account of the firm. The partnership was dissolved about a year afterwards; at which time the plaintiffs had made advances for the firm to the amount of one thousand three hundred pounds, which neither of the partners had paid. Morrall had afterwards transferred the defendant's note to the bankers. But there was no evidence that he had done so without consideration, or that the plaintiffs knew for what the note was given. And the court held that the plaintiffs were entitled to recover, whether they did or did not know for what the defendant's note was given. It is true, Chief Justice Best says, if there was a good consideration between Morrall and the plaintiffs who were ignorant of the circumstances under which Morrall took the note, they were entitled to recover. But it is evi-

dent he said this in reference to the legal rule that the indorsee of a negotiable instrument is presumed to have paid value for it, until the contrary is shown; the *onus* of disproving which, according to the decisions of the English courts, is thrown upon the party contesting the right of the holder, except where the note or bill is proved to have been lost or stolen, or to have been obtained or put in circulation by fraud. What the chief justice said in that case is not even a *dictum*, much less a decision, in opposition to the principle of law as settled in this state. For there was not a particle of equity in favor of the defendant in that case; as he was legally liable to the plaintiffs as a partner, for the whole amount of their advances, even if his note had been turned out by Morrall on account thereof. And all he had to do was to pay up the amount of his note, and the other three hundred pounds, if they required it, and then sue Morrall for what he had paid beyond his share.

The case of *Bramah v. Roberts* came before the court upon questions arising upon the pleadings. The plaintiffs were the indorsees of a bill of exchange drawn and indorsed by W. Clare for five hundred pounds, at three months, and accepted by the defendants. To the declaration on this bill the defendants pleaded: 1. The general issue; 2. That it was accepted by them without value, was delivered by one of them to T. Hunt for a special purpose, and that he fraudulently transferred the same to the plaintiffs, with notice of his want of authority, and that there was not any consideration or value given in good faith for the indorsement of the bill to them; and 3. That one of the defendants fraudulently accepted the bill, under a power to accept it for all the defendants for a special purpose, for a different purpose from what was intended, and that the other defendants received no consideration or value for such acceptance. To the second plea the plaintiffs replied, in substance, that before the bill became due it was indorsed and delivered to them fairly and *bona fide* for a good and valuable consideration, that is to say, for moneys advanced by and due and owing to them, the plaintiffs; and without notice of the matters stated in the second plea, or of the want of power on the part of Hunt to transfer the bill on his own account. To the third plea they replied substantially in the same manner, after denying the want of authority of one of the defendants to accept the bill for all of them. The defendants demurred specially to these replications, assigning as causes of demurrer that the plaintiffs had not stated with sufficient certainty what consideration or value was given

for the bill, nor when or to whom the moneys were advanced, nor whether they were advanced at the time or had been previously advanced, nor whether the moneys advanced were sufficient to authorize them to recover the whole amount of the bill. The court decided that the third plea was bad, as it only alleged that the defendants were defrauded of the bill, and that their acceptance was without consideration; but set up no want of consideration in the negotiation of the bill to the plaintiffs, or notice of the alleged fraud at the time they received the bill. No question was therefore decided upon the sufficiency of the replication to that plea. As to the replication to the second plea, Chief Justice Tindal thought it was sufficient: that it was only necessary for the plaintiffs to deny notice of the want of authority of the person from whom they received the bill, and aver that it was given to them for a full and valuable consideration; and that the replication was sufficient to show there was a good consideration. He says: "If money passed from the present indorsees, it appears to me sufficient, as against the acceptors of a bill of exchange, to allege that the bill was received for money advanced by and due and owing to them," etc. And after referring to the case of a replication in which an averment that the plaintiff was parson, and took for tithes, was construed in reference to the time of severance, he again says: "A person of plain understanding will interpret this in the same way, that there has been a money consideration passing from the plaintiffs." But the chief justice went further, and declared his opinion to be that if the replication had contained a simple denial of the allegation of a want of consideration, it would be sufficient. From his language in this case I should infer that he understood the law to be that the holders of the bill must have received the same for a valuable consideration at the time of the transfer. But I admit that Mr. Justice Park uses the words valid consideration in his opinion. He says: "If the bill of exchange was indorsed and delivered to the plaintiffs for a good and valid consideration, that is to say, for money advanced by and due and owing to the plaintiffs, and they say that at the time it was indorsed to them they had no notice whatever of the fraud, it must be taken that the bill was taken for some antecedent debt." From this it may perhaps be fairly inferred that he thought that was sufficient to enable the holder of the note to recover thereon, although no other available security for such antecedent debt was given up or discharged upon the faith and credit of the bill, at the time it was so received by the plaintiffs; but he does not

say so. And Justice Bosanquet says, "I am disposed to think that the replication would have been quite sufficient if it had not added the words, 'for money advanced by and due and owing to the plaintiffs,' thereby setting out the nature of the consideration; but that it was sufficient to say, 'that after the bill was made, and before it became due and payable, on a specified day, the bill was indorsed and delivered to the plaintiffs fairly and *bona fide*, and for a full and valuable consideration.'" But whatever may have been the opinion of the judges who decided that case, under the new rules of pleading in England, and in reference to the fact that under any form of replication which did not admit a want of a sufficient consideration, the *onus* of proving that the bill was not passed to the plaintiffs for a good and sufficient consideration would be upon the defendants, I think it is not entitled to the weight of a judicial decision upon the question now under consideration.

In the other case, *Percival v. Frampton*, the defendant had indorsed the note for the accommodation of the maker thereof, to enable him to obtain money thereon generally. And he got it discounted by his banker, who placed the proceeds to his credit, on which he afterwards drew out one hundred and ninety-eight pounds, and the residue was applied to the balance of his account. The court held that this was equivalent to an advance of the money to him. So far the decision was in accordance with the case of *The Bank of Rulland v. Buck*, 5 Wend. 66, and other cases decided in this state. For, the object of the indorsement being to enable the maker of the note to raise money generally, and not for any specific object in which the indorser had an interest, it was wholly immaterial to him whether the note was passed to the credit of the maker with his banker, or the banker advanced him the money on the note, and then received it back to make good his account, or the maker received the money from any other person upon the note, and then paid it to the plaintiffs for their debt. But in that case Mr. Baron Parke expresses the opinion that if the note had been given to the plaintiffs as security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration. From which I infer that his opinion corresponds with that of the supreme court of the United States upon the question now under consideration.

The question was raised by the counsel for the defendant, in a subsequent case, *Bartrum v. Caddy*, 9 Ad. & El. 275, that a by-gone debt is not a sufficient consideration to give a fraudu-

lent assignee a title to recover. But as the judgment was given for the defendant upon other grounds, no opinion was expressed by the court of queen's bench upon that point. And I do not think there is any decision in any court of England directly upon the question. I have not had leisure to examine the reports of most of our sister states in reference to this subject. But in addition to the case from Connecticut, referred to in the opinion of the court in *Swift v. Tyson*, there are two decisions in the state of Maine, *Homes v. Smyth*, 4 Shepley, 177, and *Norton v. Waite*, 2 Appl. 175, in which it was held, that the holder of a negotiable security, who had received it in absolute payment of a pre-existing debt, without notice, was entitled to recover thereon, notwithstanding any failure or want of consideration, or other equities previously existing between other parties. But, as I understand the opinion of Judge Shepley in the first of those cases, a party who takes a note or bill as collateral security for the payment of such a debt, and not in absolute payment and discharge of the same, will not be entitled to protection, in that state, against the rightful owner.

The decision of the supreme court of Pennsylvania, in *Petrie v. Clark*, 11 Serg. & R. 377 [14 Am. Dec. 636], appears to be in accordance with the opinion of Judge Shepley in *Homes v. Smyth*. For Judge Gibson, who delivered the opinion of the court, says, if the note had been delivered in discharge of the debt, there would be no difficulty in saying, in the absence of collusion, that taking it in the usual course of business, as an equivalent for a debt which is given up, would be a purchase of it for a valuable consideration. But as it was given in pledge for securing an antecedent debt, which was not discharged, but suffered to remain, and as it does not appear that money was advanced or any act done that would in law be a present consideration, the case presented was against the plaintiff. In the case under consideration, the notes, which were improperly transferred by Gillespie, in fraud of the rights of the owners, were not received by the plaintiff in error in payment or discharge of his debt, but as mere collateral securities for the payment thereof. He, therefore, would not be entitled to protection as a *bona fide* holder, for a valuable consideration, according to these decisions in the courts of our sister states. Nor do I think that the settled law of this state is so manifestly wrong as to authorize this court to overturn its former decision, for the purpose of conforming it to that of any other tribunal, whose decisions are not of paramount authority.

I must therefore vote to affirm the judgment of the court below.

Lott, Senator. As a general rule, the true and rightful owner of property is entitled to recover it from any person in whose possession it may be, whether obtained by the latter under color of a purchase, or otherwise. An exception, however, founded on principles of commercial policy, has been made in favor of the holder of negotiable paper, received in the usual course of trade, for a valuable consideration, though from a person having no right to make the transfer, and without notice of the fraud. Under such circumstances, the right of the holder is allowed to prevail against the claim of the previous owner.

To bring a case within the exception, it is not enough to show that there was a consideration for the transfer, sufficient as between the holder and the party transferring, but the consideration must be such as the law denominates a valuable one. In *Coddington v. Bay*, 20 Johns. 637 [9 Am. Dec. 342], a case decided by this court in which the principle of the exception was fully discussed, Mr. Justice Woodworth said: "Something must have been paid in money or property, or some existing debt satisfied, or some new responsibility incurred in consequence of the transfer; this would be paying value, and making out a consideration within the reason and meaning of the rule:" Id. 646. Chief Justice Spencer there remarked: "I understand, by the usual course of trade, not that the holder shall receive the bills or notes thus obtained, as securities for antecedent debts, but that he shall take them in his business, and as payment for a debt contracted at the time:" Id. 651. Mr. Senator Vielle observed that, "though indemnity for responsibilities is undoubtedly a good consideration for the sale or transfer of goods or negotiable paper, as against the party making it or his representatives; yet in none of the cases cited on the argument, and in no one that I have been able to find, has it ever been held to bar the true owner, upon a fraudulent transfer:" Id. 653. He added: "The true test I take to be, that when the holder is left in as good condition, after a retransfer, as he would have been had no transfer taken place, there the title of the owner shall prevail. This allows the rule, so far as it is dictated by commercial policy, to have its full effect, while it protects the owner of negotiable paper, necessarily intrusted in the course of business to the care of agents, from an injury revolting to every principle of moral equity:" Id. 657. If these doctrines are applicable to the case under consideration, and are to guide our decision, it ap-

pears to me the right of the defendants in error to the notes in question can not be impeached.

It was contended on the argument, however, that the withdrawing of the note of Gillespie & Edwards from the bank, where it had been deposited for collection, caused a loss or prejudice to the plaintiff in error, which formed a sufficient consideration to entitle him to protection. It might be enough to say, in answer to this position, that the whole force of it is rebutted by the verdict of the jury; for under the charge of the court, the verdict must be understood as having found that no consideration was parted with by the plaintiff in error on the credit of the notes in question. But apart from this view of the case, it appears that the note of Gillespie & Edwards was merely lodged in the bank for collection, and that there were no indorsers to be charged. A protest was therefore unnecessary, and no injury or prejudice in that respect could have resulted from the act of withdrawing it. True, it is said in the testimony that, after the note of Gillespie & Edwards was withdrawn, and before their failure, they paid "one or more notes in bank, in the regular course of business;" but the amount of these notes was not shown, nor did it in any manner appear that the note of the plaintiff in error would have been paid had he suffered it to remain in the bank, although one of the firm of Gillespie & Edwards was examined as a witness upon the trial.

It should be remarked also that there was no stipulation or agreement by the plaintiff in error, on withdrawing his note from the bank, that he would not enforce payment of it. On the contrary, he had still a perfect right to demand its immediate payment, and to enforce his demand by action.

In every view which can be taken of this case, it appears to me the title of the defendants in error to the notes in question has not been divested, and that the judgment of the court below ought to be affirmed.

On the question being put, "Shall this judgment be reversed?" all the members of the court present who heard the argument, except STRONG, Senator, voted for affirming.

Judgment affirmed.

TRANSFER OF NEGOTIABLE PAPER as security for or in payment of a precedent debt does not constitute the indorsee a holder for value, and therefore his rights are subordinate to the equities of antecedent parties, in fraud of whom the transfer has been made: *Phoenix Ins. Co. v. Church*, 81 N. Y. 221; 59 How. Pr. 295; *Moore v. Ryder*, 65 N. Y. 441; *Atlantic Nat. Bank etc. v. Franklin*, 55 Id. 238; *Taft v. Chapman*, 50 Id. 448; *Clark v. Ely*, 2 Sandf.

Ch. 172; *Gould v. Farmers' Loan and Trust Co.*, 23 Hun, 324; *Gale v. Miller*, 1 Lans. 461; *Holbrook v. Mix*, 1 Bosw. 158; *New York Exchange Co. v. De Wolf*, 31 N. Y. 234; *Curtiss v. Leavitt*, 15 Id. 196; *McBride v. Farmers' Bank*, 26 Id. 454; *Hoyt v. Hoyt*, 8 Bosw. 527; *Scott v. Ocean Bank*, 5 Id. 196; *Van Namee v. Bank of Troy*, 8 Barb. 322; S. C., 5 How. Pr. 171; *Spear v. Myers*, 6 Barb. 449; *Mickles v. Colvin*, 4 Id. 310; *Wright v. Delafield*, 23 Id. 520; *Fenby v. Pritchard*, 2 Sandf. 155; *Cardwell v. Hicks*, 37 Barb. 463; S. C., 23 How. Pr. 282; *Farrington v. Frankfort Bank*, 31 Barb. 189; S. C., 24 Id. 563; *Coleman v. Lansing*, 4 Lans. 72; *Clarke Nat. Bk. v. Bank of Albion*, 52 Barb. 601; *West v. American Exchange Bank*, 44 Id. 178; *Traders' Bank v. Bradner*, 43 Id. 392; *Lysaght v. Phillips*, 5 Duer, 113. If, however, when negotiable paper has been received in payment of a precedent debt, any securities are surrendered by the creditor, he will thereby be constituted a holder for value. It is a sufficient compliance with this requisite that the negotiable paper of the debtor alone has been given up to be canceled: *Youngs v. Lee*, 18 Barb. 192; *Montross v. Clark*, 2 Sandf. 117; *White v. Springfield Bank*, 3 Id. 224; *Youngs v. Lee*, 12 N. Y. 555; *Brown v. Leavitt*, 31 Id. 114. Even where no such security has been surrendered, if the negotiable paper has been received not only in nominal payment of, but in actual discharge of the debt, and upon its receipt all recourse against the debtor, in any event, is abandoned, so that unless the paper is available in the creditor's hands he must lose his debt, he will be considered a holder for value, and protected accordingly against all prior equities: *Philbrick v. Dallett*, 43 How. Pr. 425; S. C., 12 Abb. Pr. (N. S.) 425; *Purchase v. Mattison*, 3 Bosw. 312. All the above cases cite the principal case. See upon this subject the note to *Bank of St. Albans v. Gilliland*, 35 Am. Dec. 566.

WHERE A NOTE HAS BEEN EXECUTED FOR THE ACCOMMODATION of the indorser, and no restriction is affixed as to its use, the maker may not resist the claim of the indorsee to whom it has been transferred as collateral security for the payment of a precedent debt: *Grocers' Bank v. Penfield*, 2 Abb. (N. C.) 310; S. C., 69 N. Y. 502.

WHERE PARTIAL VALUE ONLY APPEARS TO HAVE BEEN PARTED WITH upon the faith and transfer of commercial paper, the right of the holder to recover upon it is restricted to the amount of such value: *Stevens v. Corn Exchange Bank*, 5 Thomp. & C. 287; S. C., 3 Hun, 150; S. C., 48 How. Pr. 354; *Huff v. Wagner*, 63 Barb. 230.

CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

GRAHAM v. HOLT.

[3 FREDELL'S LAW, 300.]

AUTHORITY TO EXECUTE BOND AS AGENT FOR ANOTHER, whether for money or other property, must be under seal.

BOND EXECUTED UNDER PAROL AUTHORITY is void; therefore, where the obligor, by parol, authorizes a third party to fill in the amount of a bond, the bond is void.

ONE PARTNER CAN NOT SUE COPARTNER till there has been a complete settlement and a balance struck.

DEBT in two counts: 1. On a bond; and, 2. On a simple contract for the same sum. The plaintiff, on the trial, produced a bond conforming to the allegations in the first count. Defendant called a witness who testified that plaintiff's intestate and defendant were engaged in business as partners; that defendant and the intestate's administrator, the plaintiff, agreed that defendant should take and sell the goods, and pay the plaintiff his share, after the expiration of a certain time; that afterwards plaintiff told defendant that he must have something to return to the court, as administrator, for the intestate's share; and that the bond in suit was then drawn up, signed, and sealed by the defendant, but as the amount of goods taken was not known, the sum was left blank, and it was agreed that the witness should take the bond, ascertain the amount due from the inventory, and insert it. This he accordingly did, and handed the bond thus filled in to the plaintiff. In support of the second count, the plaintiff offered evidence to prove that this amount had been realized by the defendant, but the evidence was rejected. Ver-

dict for the defendant, and judgment thereon. Plaintiff appealed.

Graham, for the plaintiff.

Norwood, *contra*.

By Court, DANIEL, J. As to the first count: A bond is the acknowledgment of a debt under seal, the debt being therein particularly specified. In every good bond there must be an obligor and obligee, and a sum in which the former is bound: Shep. Touch. 56 Com. Dig., Obligation, A.; *Gough v. Everard*, 2 H. & C. 1. In New York, *Ex parte Kerwin*, 8 Cow. 118, and some other of the American cases, the *nisi prius* decision before Lord Mansfield of *Texira v. Evans*, 1 Anst. 229, *in nota*, has been followed. That case was, where a party executed a bond with blank spaces for the name and sum, and sent an agent, without a power of attorney under seal, to raise money on it; the agent accordingly filled up the blanks with the sum and the obligee's name, and delivered the bond to him. On the plea of *non est factum* the bond was considered well executed. But the case of *Texira v. Evans* has been by this court twice overruled, as attempting to establish a distinction in the mode of executing deeds by attorney, where the object was to raise or secure money, and when it was to operate as a conveyance—the first, by a power of attorney not sealed, the other with a power of attorney under seal. The notion with us has always been, what we learned from Co. Lit. 52 (a) and Touch. 57, that he who executes a deed as agent for another, be it for money or other property, must be armed with an authority under seal: *McKee v. Hicks*, 2 Dev. 379; *Davenport v. Sleight*, 2 Dev. & B. 381 [31 Am. Dec. 420]. The insertion of the sum in the blank space was intended to consummate the deed; it was done without legal authority, and the instrument is void as a bond.

As to the second count. Before one partner or his representative can sue another partner at law, the settlement of the firm must be complete and a balance struck: Coll. on Part. 152; *Fromont v. Coupland*, 2 Bing. 170.

We see no error in the opinion of the court on either of the counts, and the judgment must be affirmed.

Judgment affirmed.

AUTHORITY TO EXECUTE DEED MUST BE GIVEN BY DEED: *Reed v. Van Ostrand*, 19 Am. Dec. 529; *Blood v. Goodrich*, 24 Id. 121; *Jackson v. Murray*, 17 Id. 53; *Davenport v. Sleight*, 31 Id. 420; *Turbeville v. Ryan*, 34 Id. 622. The principal case was cited to this point in *Blacknall v. Parish*, 6 Jones' Eq. 72, and referred to with approval in *Phelps v. Call*, 7 Ired. L. 264.

PARTNER CAN NOT MAINTAIN ACTION AGAINST COPARTNER BEFORE SETTLEMENT: *Murray v. Bogert*, 7 Am. Dec. 486; *Course v. Prince*, 12 Id. 649; *Rurley v. Harris*, 29 Id. 650; *Lawrence v. Clark*, 35 Id. 133; and notes referring to other cases in this series.

BENNETT v. SHERROD.

[3 IREDELL'S LAW, 303.]

WHERE A MUTILATED WILL IS FOUND, the testator, in the absence of proof, is presumed to have done the act, if it was done while in his possession or is discovered among his papers canceled or defaced.

IDEM—PRESUMPTION THAT TESTATOR MUTILATED WILL DOES NOT APPLY where it is found in that condition under the control of a person to be benefited by its revocation, and where such person, on being asked for it, acknowledged that there was a will, said nothing about the mutilation, refused then to deliver it up, and it was not obtained till the following day.

JOHN SHERROD executed the instrument in question with all the formalities necessary to the validity of a will, and placed it in the possession of the plaintiff, the executor under the will. Being dissatisfied with a legacy to his sister therein, and wishing to add to the bequest, he took the will back again. After his decease, plaintiff applied to the defendant, deceased's widow, for the will. She replied that there was a will there, but it was not her husband's; that if it was his it was not hers, and she would not stand to it. She then consulted with a friend as to whether she would give it up, and after a while took it from the drawer and put it in her bosom. Next day the papers were examined, and the instrument in suit was found, identical with that above executed, except that the names of the testator and subscribing witnesses were cut out. The judge instructed the jury that if they believed the cutting was done by Sherrod, or by his direction, they must find it not to be his will; otherwise, they were to find it to be his will. The defendant moved the court to instruct the jury, that if they believed the instrument to be found in a mutilated condition in the deceased's possession, the presumption was that he mutilated it, subject, however, to rebuttal by the proponents. This instruction was refused. Verdict for the plaintiff. Defendant appealed.

No counsel for the plaintiff.

Badger, contra.

By Court, DANIEL, J. The authorities cited by the counsel for the appellant show, that, where a will has been duly executed

and left with the testator, if it be mutilated in his life-time while in his possession, or upon his death if it be found among his repositories, canceled or defaced, in such cases, in the absence of other proof, the testator is presumed to have done the act; and the law further presumes that he did it *animo revocandi*. And if the repository of the will was at the same time accessible to the testator and another person, and the mutilation was done in the life-time of the testator, the law would presume it was done by the testator. He had a right to do it, and a fraud will not be presumed in the other person. All the rules above stated, we think, may be taken for good law, but it seems to us that they are not apposite to the case now before us. There is no evidence in the cause, that the will was found mutilated in the life-time of the testator, or found mutilated among his papers immediately on his death. It was on the day after his death that application was made to his widow for the will. She, who is the party defendant in this issue, acknowledged that the will or paper was there, but refused then to deliver it. She then locked the drawer, where the paper was, and put the key in her bosom. There is no evidence that the will was at that time mutilated, for her declarations then made do not prove that fact, but rather import the contrary. On the second day after the testator's death, and after the widow had every opportunity of mutilating the paper, with which she was dissatisfied, the will was found by the plaintiff in the drawer in its present state. It seems to us, so far from its being the duty of the judge to charge the jury, that the law presumed this mutilation to have been the act of the testator, that it would have been erroneous if he had so charged. We are of opinion that the judgment must be affirmed.

Judgment affirmed.

WILL DESTROYED WITHOUT TESTATOR'S KNOWLEDGE, either before or after his death, does not cease to be his will: *Dickey v. Malecki*, 34 Am. Dec. 130.

UNEKECUTED WILL, HOW FAR VALID: See note to *Guthrie v. Owen*, 36 Am. Dec. 311, where this subject is discussed.

RAINEY v. LINK.

[3 IREDELL'S LAW, 376.]

NEW PROMISE, TO TAKE CASE OUT OF STATUTE OF LIMITATIONS, must be a direct promise to pay the debt; a promise can not be inferred from a mere acknowledgment that the defendant owed the plaintiff some debt.

ASSUMPT to recover a carpenter's bill and for services rendered as a doctor. Pleas, the general issue and the statute of limitations. Plaintiff, to take the case out of the statute, introduced a witness who testified that she had heard defendant say within three years he did not want to affront plaintiff, as he "owed him right smart of money." Another witness testified that within three years defendant had said that "he owed the plaintiff the biggest debt he owed to any person." The court instructed the jury that there was not a sufficient acknowledgment to take the case out of the statute of limitations, and the jury found for defendant on that issue. Plaintiff moved to set it aside, and, the motion being refused, appealed.

Graham, for the plaintiff.

Norwood, *contra*.

By Court, **RUFIN**, C. J. Perhaps no undertaking would be more difficult, than an attempt to lay down beforehand what words will or will not amount to a promise, so as to take a case out of the statute of limitations; for the construction will necessarily vary with the infinite variety of expressions that persons may use. But it is our duty to attain a rule upon this subject, as on others, as nearly as may be, that persons may know how to regulate their dealings and come to settlements without resorting to judicial decisions. We have heretofore in the case of *Smallwood v. Smallwood*, 2 Dev. & B. 330, stated our opinion, that, although the plaintiff need not declare on the new promise, but may declare on the old one and give the other in evidence to repel the statute, yet the new promise, in order to have that effect, must be such as might be laid in the declaration as a promise to pay the same debt, and to the same extent, as is sought to be recovered in the action as brought. We can conceive no other rule, unless one so very loose as to render the statute nearly inoperative. And we held in that case, that, if the defendant's letter were to be considered a promise to pay the plaintiff's demand, yet the term "demand" was too vague in itself, without some reference to the particular demand meant, its nature or amount, to authorize a recovery, if directly declared on, and therefore inadequate to help out an action on the original consideration. The same reasons apply to the case before us now. There is no direct promise to pay any debt; but it is an attempt to infer a promise to pay this debt from a mere acknowledgment that the intestate owed the plaintiff some debt, but on what account or to what amount he did not say and we

have no means of collecting, nor whether he was willing to pay it. It would be opening the door to every mischief, for which the statute was intended as a remedy, if these loose declarations were allowed to constitute a promise to pay whatever the plaintiff could prove the intestate had owed him at any time and upon any account.

Judgment affirmed.

ACKNOWLEDGING DEBT BARRED BY STATUTE: See *Burden v. McElhenny*, 10 Am. Dec. 570, and note; *Johnson v. Bounathen*, 30 Id. 347, the note to which refers to other cases in this series; *Elliott v. Leake*, 32 Id. 314; *Sutton v. Burrows*, 33 Id. 246.

THE PRINCIPAL CASE IS CITED to the point that the promise must be express and explicit, in *Sherrod v. Bennett*, 8 Ired. L. 309; *McRae v. Leary*, 1 Jones' L. 93.

DISABILITIES UNDER STATUTE OF LIMITATIONS: See note to *Moore v. Armstrong*, 36 Am. Dec. 63, where this subject is discussed at length.

SHULTZ v. YOUNG.

[3 IREDELL'S LAW, 385.]

CALL IN GRANT FROM ONE TERMINUS TO ANOTHER is *prima facie* understood to mean a direct line from the former to the latter point, where there are no accompanying words of description which indicate that the line is not to be a direct line.

CONSTRUCTION OF INSTRUMENT SHOULD GIVE EFFORT to every part thereof; and in expounding the descriptions in a deed or grant, they should all be reconciled, if possible.

DEFECTIVE DESCRIPTION, HOW CORRECTED.—Where the disputed boundary proceeded from a certain point "south with R. G.'s line three hundred and ten poles to T. G.'s old corner," and in reality R. G.'s line did not reach the corner mentioned, the boundary will be ascertained by following R. G.'s line as far as called for, and then running a line from thence to T. G.'s old corner, though two lines are thus formed instead of one, when it is clear that the parties intended to include R. G.'s line in the description.

EJECTMENT. The case turned upon the construction of the description in a grant under which the plaintiff claimed. The disputed boundary called for "the north-west corner of Richard Goode's tract," and proceeded "thence south with Richard Goode's line three hundred and ten poles to Thomas Goode's old corner." As a matter of fact this line did not reach to Thomas Goode's corner. The termini were admitted. The defendant claimed that the boundary was to be ascertained by running a straight line from the north-west corner of Richard

Goode's tract to Thomas Goode's old corner, though "Richard Goode's line" as called for would be disregarded. Plaintiff claimed that that line should be followed as far as called for, and thence a line should be run to Thomas Goode's old corner, though the line thus run diverged at almost a right angle, and two lines were formed thereby. The court instructed the jury that if they found Richard Goode's line did run from the north-west corner south three hundred and ten poles, they should extend the line as contended for by the plaintiff. Verdict for plaintiff and judgment thereon. Defendant appealed.

Morehead, for the plaintiff.

Boyden, contra.

By Court, GASTON, J. *Prima facie* a call in a grant for one terminus to another is understood to mean a direct line from the former to the latter point. But assuredly there may be accompanying words of description, which will indicate that the line is not to be a direct line. Thus it is of ordinary occurrence, that, when the call is with a river or creek from one terminus to another, the river or creek, however crooked its direction or numerous its courses, if it will carry you to the proposed terminus, must be followed throughout. Nor could there be any difficulty in holding, that, if the call were for a county line or the line of another tract, or a marked line, such line, however sinuous or indirect, if it ended at the terminus called for, must be faithfully followed. In these cases, and cases like these, the whole of the description of the thing granted is obviously consistent, and every part of it by this construction receives its full effect. You go from one terminus to another, and you go by the guide which you are directed to follow. But when the terminus can not be reached merely by following the mode pointed out in the description, the question occurs, shall this mode be wholly disregarded, or shall it be observed so far as it is represented as leading to the terminus, and then to be relinquished for a direct line to the terminus? Herein it appears that the law distinguishes between the degrees of certainty, which different descriptions hold forth. If the description be one by course and distance only, it is clear that such description is disregarded, and the line is in law a direct line from one point to the other. But if it be by a permanent natural boundary, then the description is regarded as sufficiently certain to require that it should be respected, and the line must pursue that description so far as it conducts towards the terminus. This is fully estab-

lished in *Sandifer v. Foster*, 1 Hayw. 237, which is always referred to as a leading authority on questions of boundary.

Now, independently of the peculiar respect which natural boundaries command with us, this decision is proper on general principles. By following the line referred to in the description, so far as it leads towards the terminus or is expressly directed, the call for the terminus is not disregarded. The terminus is still reached, though not reached by the direct line, which would have been presumed to be intended, had that call been the only description. But by running a direct line to the terminus, a part of the description, which is perfectly intelligible, and which was assuredly designed to aid in ascertaining the thing granted, is wholly rejected. It is a leading rule in the construction of all instruments, that effect should be given to every part thereof; and, in expounding the descriptions in a deed or grant of the subject-matter thereof, they ought all to be reconciled if possible, and as far as possible. If they can not stand together, and one indicate the thing granted with superior certainty, the other may be disregarded as a mistaken reference. But so long and so far as they may stand together, each of them is to be considered as declaring the intent of the parties.

When, indeed, the description accompanying a terminus is, "running with a line" of another deed or tract, such description is ordinarily less certain than where it refers to a natural object. The latter is usually notorious, and can seldom therefore be mistaken; while the former may not be well known, and is consequently sometimes misapprehended. But in fact the lines of other tracts may be as notorious and certain as any natural objects, and by making one of these lines a part of the description of the thing granted, the parties represent it as a known line, by which the certainty of the thing granted is defined. It seems to us, therefore, that such a description, as a guide for reaching a terminus, ought equally to be respected with one referring to natural objects, if the line described can be ascertained to have been then well known—and that it ought never to be disregarded altogether, unless there be reason to believe that it was misapprehended by the parties.

In this case there was no reason for such belief, unless it were that the line described did not directly reach the terminus; and to hold this a sufficient reason were to decide that the call for the terminus overruled the rest of the description. On the contrary, there were manifest and strong reasons for believing that this line was well known to the parties. The terminus, de-

scribed in the grant as the north-west corner of the Richard Goode tract, is admitted to be the true north-west corner of that grant; and the call "thence south with the line of the tract three hundred and ten poles," corresponds with the course and distance of the line of the tract, which runs from that north-west corner. The jury have found that the line was where the parties to the grant called for it, and this must exclude the inference that they called for it by mistake.

Judgment affirmed.

BOUNDARIES, CONFUSION OF AND EVIDENCE AS TO.—The cases in this series on these subjects are collected in the note to *Newman v. Foster*, 34 Am. Dec. 98. See also *Seidensparger v. Spear*, 35 Id. 234; *Doe v. Porter*, 36 Id. 443; *Griffin v. Bizby*, 37 Id. 225; *Bullard v. Coppe*, Id. 561; *Felder v. Bonnett*, Id. 545. The principal case was approved in *Long v. Long*, 73 N. C. 371.

STATE v. HUNTLY.

[3 IREDELL'S LAW, 413.]

RIDING OR GOING ABOUT ARMED with unusual and dangerous weapons, to the terror of the people, is an offense at the common law. The statute of Northampton, 2 Edw. III., c. 3, was merely an affirmance of the common law.

DECLARATIONS OF DEFENDANT OF HIS INTENT TO KILL or injure a certain person are admissible under an indictment charging him with going about armed, with intent to do injury, as a part of the offense.

GUN IS AN UNUSUAL WEAPON wherewith to be armed and clad, and it is an offense to carry one with evil intent; though citizens are at liberty to carry them for any lawful purpose.

INDICTMENT accusing defendant of arming himself with a gun and other dangerous and unusual weapons, exhibiting himself in the highways and before the people, to their terror, and threatening openly, and declaring his intent publicly, to injure one Ratcliff. On the trial, evidence was offered to prove that he had several times declared that he intended to kill Ratcliff, if he did not surrender certain negroes to him, and that he had laid in wait for him, and would have killed him had he shown himself. This evidence was objected to, but admitted. The court instructed, that if the facts were as charged, defendant was guilty. The jury found the defendant guilty. His counsel moved for a new trial; first, because evidence of his declarations had been improperly received; secondly, because, if all the facts were true, they constituted no offense. The motion was overruled, and the defendant appealed.

Whitaker, attorney general, for the state.

Winston, for the defendant.

By Court, GASTON, J. On the trial it was insisted by the defendant's counsel, and the judge was required so to instruct the jury, that if the facts charged in the indictment were all true, they nevertheless constituted in law no offense of which they could find the defendant guilty. His honor refused this prayer, and instructed the jury, that, if the facts charged were proved to their satisfaction, it was their duty to find him guilty. The same ground of defense has been taken here by way of a motion in arrest of judgment; but we are of opinion that in whatever form presented, it is not tenable.

The argument is, that the offense of riding or going about armed with unusual and dangerous weapons, to the terror of the people, was created by the statute of Northampton, 2 Edward III., c. 8, and that, whether this statute was or was not formerly in force in this state, it certainly has not been since the first of January, 1838, at which day it is declared in the revised statutes, c. 1, sec. 2, that the statutes of England or Great Britain shall cease to be of force and effect here. We have been accustomed to believe, that the statute referred to did not create this offense, but provided only special penalties and modes of proceeding for its more effectual suppression, and of the correctness of this belief we can see no reason to doubt. All the elementary writers, who give us any information on the subject, concur in this representation, nor is there to be found in them, as far as we are aware, a *dictum* or intimation to the contrary. Blackstone states, that "the offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edward III., c. 8, upon pain of forfeiture of the arms, and imprisonment during the king's pleasure:" 4 Bl. Com. 149. Hawkins, treating of offenses against the public peace under the head of "affrays," pointedly remarks: "But granting that no bare words in judgment of law carry in them so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray, where there is no actual violence, as where a man arms himself with dangerous and unusual weapons in such a manner, as will naturally cause a terror to the people, which is said to have been always an offense at common law and strictly prohibited by many statutes:" Hawk. P. C., b. 1, c. 28, sec. 1. Burns and Tomlyns

inform us, that this term "affray," is derived from the French word "*effrayer*," to affright, and that anciently it meant no more, "as where persons appeared with armor or weapons not usually worn, to the terror of others." Burns, *verbo* "Affray;" Dier, *Id*.

It was declared by the chief justice, in *Sir John Knight's Case*, that the statute of Northampton was made in affirmance of the common law: 3 Mod. 117. And this is manifestly the doctrine of Coke, as will be found on comparing his observations on the word "affray," which he defines, 3 Inst. 158, "a public offense to the terror of the king's subjects, and so called because it affrighteth and maketh men afraid, and is inquirable in a leet as a common nuisance," with his reference immediately thereafter to this statute, and his subsequent comments on it, 3 Id. 160, where he cites a record of the twenty-ninth year of Edward I., showing what had been considered the law then. Indeed, if those facts be deemed, by the common law, crimes and misdemeanors, which are in violation of the public rights and of the duties owing to the community in its social capacity, it is difficult to imagine any which more unequivocally deserve to be so considered than the acts charged upon this defendant. They attack directly that public order and sense of security, which it is one of the first objects of the common law, and ought to be of the law of all regulated societies, to preserve inviolate—and they lead almost necessarily to actual violence. Nor can it for a moment be supposed, that such acts are less mischievous here or less the proper subjects of legal reprehension, than they were in the country of our ancestors. The bill of rights in this state secures to every man indeed, the right to "bear arms for the defense of the state." While it secures to him a right of which he can not be deprived, it holds forth the duty in execution of which that right is to be exercised. If he employ those arms, which he ought to wield for the safety and protection of his country, to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege with which he has been invested.

It was objected below, and the objection has been also urged here, that the court erred in admitting evidence of the declarations of the defendant, set forth in the case, because those, or some of them at least, were acknowledgments of a different offense from that charged. But these declarations were clearly proper, because they accompanied, explained, and characterized

the very acts charged. They were not received at all as admissions either of the offense under trial, or any other offense. They were constituent parts of that offense.

It has been remarked, that a double-barreled gun, or any other gun, can not in this country come under the description of "unusual weapons," for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an "unusual weapon," wherewith to be armed and clad. No man amongst us carries it about with him, as one of his everyday accouterments—as a part of his dress—and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving and law-abiding state, as an appendage of manly equipment. But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun *per se* constitutes no offense. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.

Our opinion is, that there is no error in the sentence below. This decision will be certified to the superior court of Anson accordingly.

Ordered accordingly.

THE PRINCIPAL CASE IS CITED to the point that going about armed, and terrifying the people, is an offense against the public peace, in *State v. Lanier*, 71 N. C. 289, and is referred to approvingly in *State v. Brandon*, 8 Jones' L. 466.

WEBB v. FULCHIRE.

[3 IREDELL'S LAW, 485.]

ACTION CAN NOT BE MAINTAINED ON ILLEGAL CONTRACT, either to enforce it directly, or to recover back money paid on it after its execution.

MONEY FAIRLY LOST AT PLAY at a forbidden game, and paid, can not be recovered back in an action for money had and received.

MONEY WON BY CHEATING at any kind of game, whether allowed or forbidden, or by means of jugglery, and paid by the loser without knowledge of the fraud, may be recovered back.

ASSUMPSIT to recover a sum of money lost at gaming. The defendant had three acorn cups and a white ball. He placed,

or seemed to place, the ball under one of the cups, in the plaintiff's presence, and then bet him he could not tell under which one the ball was. The plaintiff bet several times, and lost each time. Verdict for plaintiff, which was set aside by the court and a nonsuit entered. Plaintiff appealed.

No counsel appeared for the plaintiff in this court.

J. W. Bryan, contra.

By Court, RUFFIN, C. J. It is not denied that the law gives no action to a party to an illegal contract, either to enforce it directly, or to recover back money paid on it after its execution. Nor is it doubted, that money, fairly lost at play at a forbidden game and paid, can not be recovered back in an action for money had and received. But it is perfectly certain, that money, won by cheating at any kind of game, whether allowed or forbidden, and paid by the loser without a knowledge of the fraud, may be recovered. A wager won by such undue means is not won in the view of the law, and, therefore, the money is paid without consideration and by mistake, and may be recovered back. That, we think, was plainly this case. The bet was, that the plaintiff could not tell, which of the three cups covered the ball. Well, the case states that the defendant put the ball under a particular one of the cups, and, then, that the plaintiff selected that cup, as the one under which the ball was. Thus we must understand the case, because it states as a fact, that the defendant "placed the ball under one of the cups," and that the plaintiff "pointed to the cup," that is, the one under which he had seen the ball put, as being that which still covered it. We are not told how this matter was managed, nor do we pretend to know the secret. But it is indubitable, that the ball was, by deceit, not put under the cup, as the defendant had made the plaintiff believe, and under which belief he had drawn him into the wager; or that, after it was so placed, it was privily and artfully removed either before or at the time the cup was raised. If the former be the truth of the case, there was a false practice and gross deception upon the very point, that induced the laying of the wager, namely, that the ball was actually put under the cup. For, clearly, the words and acts of the defendant amount to a representation, that such was the fact; and, indeed, the case states it as the fact. Hence, and because we can not suppose the vision of the plaintiff to have been so illuded, we rather presume the truth to be, that the ball was actually placed where the defendant pretended to place it, that is to say,

under the particular cup which the plaintiff designated as covering it. Then the case states that the defendant raised that cup, and the ball was not there: a physical impossibility, unless it had been removed by some contrivance and sleight of hand by the defendant. Unquestionably it was effected by some such means; for presently we find the defendant in possession of the ball, ready for a repetition of the bet and the same artifice.

Such a transaction can not for a moment be regarded as a wager, depending on a future and uncertain event; but it was only a pretended wager, to be determined by a contingency in show only, but in fact by a trick in jugglery by one of the parties, practiced upon the unknowing and unsuspecting simplicity and credulity of the other. Surely, the artless fool, who seems to have been alike bereft of his senses and his money, is not to be deemed a partaker in the same crime, *in pari delicto*, with the juggling knave, who gulled and fleeced him. The whole was a downright and undeniable cheat; and the plaintiff parted with his money under the mistaken belief, that it had been fairly won from him, and, therefore, may recover it back. The judgment of nonsuit is reversed, and judgment for the plaintiff according to the verdict.

Judgment below reversed and judgment for the plaintiff.

CONTRACTS IN VIOLATION OF LAW can not be enforced: *Gravier v. Carraby*, 36 Am. Dec. 608, and note referring to other cases in this series.

MONEY LOST AT GAMING can not be recovered back: *Hudspeth v. Wilson*, 21 Am. Dec. 344; *Babcock v. Thompson*, 15 Id. 235; *Downs v. Quarles*, 12 Id. 337; *Bell v. Parker*, 28 Id. 55; *Rust v. Gott*, 18 Id. 497; *Edgell v. McLaughlin*, 36 Id. 214; *Stacy v. Foss*, Id. 755; though see *McAllister v. Hoffman*, 16 Id. 556, and *Ellis v. Beale*, 36 Id. 726. A note in the hands of a third person, given for a gambling consideration, is good even though he had notice of that fact: *Jones v. Sevier*, 13 Id. 218. And a bond in the hands of a *bona fide* purchaser is valid though given on a gaming consideration: *Chiles v. Coleman*, 12 Id. 396. See also *Shropshire v. Glascock*, 31 Id. 189; *Jeffrey v. Ticklin*, 36 Id. 456; *Russell v. Pyland*, Id. 307; *Schackelford v. Ward*, 36 Id. 435.

WHAT CONSTITUTES GAMING: See note to *State v. Smith*, 33 Am. Dec. 132, discussing this question; *Ellis v. Beale*, 36 Id. 726; *State v. Price*, 37 Id. 81.

IVES v. JONES.

[3 INDELL'S LAW, 538.]

INDEMNITY FOR ACTS APPARENTLY RIGHT, or not apparently wrong, is valid, where the means employed are not in themselves criminal and are not known by the person employed to be wrongful, though they work a trespass on the rights of a third person.

IDEM.—Where defendant represented to plaintiff that he owned a tract of land up to a certain point and employed him to move back a fence situated thereon to that point, agreeing to save the plaintiff harmless from any proceedings taken by the owner of the adjoining tract, he will be responsible for the damages the plaintiff was compelled to pay in a suit by owner of the adjoining tract for trespass.

ASSUMPSIT on an indemnity. Defendant agreed to sell plaintiff, his overseer, a tract of land. Plaintiff represented that the fence on one side of the tract did not run quite to the line, gave notice to Balance, the adjoining owner, to move it back to the line, and then directed plaintiff to move the fence himself if Balance did not do it by a certain time, saying: "If Balance does not agree to it, but chooses to bring suit against you, I will pay all damages and save you harmless." He accordingly moved the fence, Balance being then at sea. On his return he brought an action of trespass against the plaintiff and defendant, and obtained a judgment against the present plaintiff only, the present defendant being found not guilty, which was satisfied by means of an execution against the plaintiff. This suit was then brought. The defendant contended: 1. That as the verdict in the action of trespass had been in his favor, he was under no obligation to pay the plaintiff's damages and costs; 2. That the promise of indemnity was given for the purpose of inducing another to commit a trespass and was void. The court held that the defendant was not discharged by the verdict in trespass; and that the promise of indemnity was valid, as plaintiff had obeyed his directions in asserting his employer's title to land, having no reason to believe the property not to be in the defendant, and had not been guilty of an open, wrongful trespass, against which the promise would be void. Verdict and judgment for plaintiff. A new trial was denied, and defendant appealed.

Kinney, for the plaintiff.

No counsel *contra*.

By Court, **RUFFIN, C. J.** We think his honor put the case upon the true ground, and that the judgment must be affirmed. The correct distinction is stated in the case of *Merryweather v. Nixan*, 8 T. R. 186, which has been cited for the defendant. The particulars of that case are not given in the report, but the injury must have been forcible and wanton. For Lord Kenyon, after recognizing the general rule, that there could be no contribution between joint wrong-doers, nor, of course, redress upon

a contract to do an unlawful thing, distinguishes that case from one, in which there could be redress, by saying "that decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting right." If it were not so, no one could ever expect assistance in enforcing his rights by means, even the most peaceable, which would subject the parties to an action sounding in tort, and an end would be put to indemnities. For, if the right be with the person indemnifying, there is no need of the indemnity; and if it turn out to be in another, who recovers for the injury, the rule would make the indemnity void. But when the object is apparently in furtherance of justice and in the exercise of a right, and the means are not in themselves criminal, and not known by the person employed to be wrongful to a third person, there can be no objection to giving effect to a contract to save harmless, one, who, from good motives, did an act for his employer, which, contrary to his expectation, happened to be an injury to a third person. That is not like the perpetrator of an act, manifestly unlawful and criminal, seeking redress against the procurer. Indemnities for acts apparently right, or not apparently wrong, have always been upheld.

As long ago as the case of *Arundel v. Gardiner*, Cro. Jac. 652, it was held that an action would lie for the sheriff, on a promise of indemnity, made by an execution creditor for levying on goods, as the property of the defendant in the execution, which were in the possession of another person, who was in fact the owner. The same doctrine has been recently held by the house of lords, in *Humphrys v. Pratt*, 2 Dow. & C. 288. If, in truth, such a seizure by the sheriff were a wanton act in him, well knowing that the property was in the possessor and not in the debtor, and made for the purpose of harassing the former, he, as purely a wrong-doer, could receive no countenance from the law. But when it is made upon the assertion of the creditor, that the goods are the property of his debtor and liable to be seized, the conduct of the sheriff is fair, and being for the benefit of the creditor, it is manifestly just that the latter should make good his promises, that the officer should not be a loser by such an act.

There have been other cases which have further extended the principle. In *Adamson v. Jarvis*, 4 Bing. 66, the plaintiff, an auctioneer, sold goods under the order of the defendant, who represented himself to be entitled to them, and received the proceeds from the auctioneer, from whom, however, the true owner

afterwards recovered the value, and it was held, that the action would lie to recover back the damages and costs. Chief Justice Best thus expressed himself: "Every person, who employs another to do an act, which the employer appears to have a right to authorize, undertakes to indemnify him for all such acts as would be lawful, if the employer had the authority he pretends to have, and a contrary doctrine would create great alarm." He added, "that from the concluding part of Lord Kenyon's judgment, in *Merryweather v. Nixan*, and from reason, justice, and sound policy, the rule, that wrong-doers can not have redress against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." In *Betts & Drewe v. Gibbins*, 2 Ad. & El. 57, the defendant sold ten casks of goods to N. & W. and sent them to the plaintiffs, with notice that they were for N. & W., and with directions to deliver them. After delivering two casks, the plaintiffs were ordered by the defendant, and indemnified not to deliver any more to N. & W., but to deliver the remainder to another person—which they did. The plaintiffs were then sued in trover by the assignees of N. & W., who had become bankrupts, and, for the damages and costs in that action, the plaintiffs then sued the defendant, and had judgment. Lord Denman said, supposing there was a *bona fide* doubt, the plaintiff had a right to act upon the instructions of the defendant, and might come on him for the consequences of so doing. He further said, that the case of *Merryweather v. Nixan* had been strained beyond what the decision would bear; that the general rule is, that between wrong-doers there is neither indemnity nor contribution, but there is an exception, where the act is not clearly illegal in itself. And one of the other judges remarked, that the case bore no analogy to those in which an indemnity is claimed for acts obviously unlawful, like breaches of the peace, or to cases in which the conduct of the parties is in contravention of public policy. In the case at bar, the defendant claimed to be the owner of land up to a particular line, and ordered the plaintiff, who was in his employment, to set his fence to the line, and the plaintiff, simply for obedience to those orders, and without having committed any public offense, and being innocent of any intentional wrong to any other person, has been compelled to pay damages and costs for the trespass, to a person who turned out to be the owner of the land, and now sues on the defendant's express promise of indemnity. Surely, no claim could have a broader foundation of justice, or, as we think, law, to

support it. The verdict in the former action, acquitting the defendant, avails nothing here. It only shows that the plaintiff in that action could not prove the present defendant's orders, or indemnity to the present plaintiff. But, as between the present parties, those facts were not in issue before, and therefore neither is concluded.

Judgment affirmed.

INDEMNITY, AGREEMENT FOR, WHEN VOID BECAUSE NOT INDEMNIFIED AGAINST IS ILLEGAL.—As a general rule, a bond given to indemnify against the consequences of an unlawful act, is void. But there is an exception to this rule in the case where the act indemnified against is apparently right and in the furtherance of a legal claim, and the party committing the act is ignorant of the fact that he is doing wrong. The distinction is, if the act threatened, or agreed to be done, is known at the time to be wrongful, an express promise to indemnify is illegal; but if this is not known at the time, and the act is seemingly lawful, the bond of indemnity is valid. The distinction is well stated in *Stanton v. McMullen*, 7 Ill. App. 326. In that case, a sheriff was about to levy an execution on certain goods, and there being a reasonable doubt as to their ownership, the execution creditor executed a bond of indemnity, agreeing to save him harmless from the consequences. The goods proved to be exempt, and a judgment was obtained against the sheriff for levying on exempt goods, and he brought an action on the bond, and the defense was set up that the bond was void. Pillsbury, J., said: "It is contended by defendant in error, that at the time the bond was executed, the plaintiff in error knew he would commit a trespass in selling the property, and therefore the bond is void, upon the principle, that a promise to indemnify another for known acts of trespass can not be enforced, as such contracts are contrary to public policy. This is undoubtedly a rule of the common law, where the proposed act is a palpable wrong, and so known to be by the parties at the time of the agreement to perform such act. But it is believed this rule has never been extended to cases where parties, in the prosecution of their legal rights in good faith, have committed an unintentional wrong against another. We understand the rule to be limited to those cases where the intention is to commit a trespass, and does not include cases where the parties are actuated by honest motives in the assertion of what they believe to be their rights under the law, although it should subsequently transpire that they were not justified in doing the acts contemplated by them when the bond was executed." This distinction has been frequently recognized: *Moore v. Appleton*, 26 Ala. 633; *Anderson v. Farns*, 7 Blackf. 343; *Jacobs v. Pollard*, 10 Cush. 288; *Shotwell v. Hamblin*, 23 Miss. 156; *Forniquet v. Tegarden*, 24 Id. 96; *Pierson v. Thompson*, 1 Edw. Ch. (N. Y.) 212; *Coventry v. Barton*, 17 Johns. 142; S. C., 8 Am. Dec. 376; *Stone v. Hooker*, 9 Cow. 154; *Cumpston v. Lambert*, 18 Ohio, 81; *Acheson v. Miller*, 2 Ohio St. 203; *Jameison v. Calhoun*, 2 Speer (S. C.), 19; *Kemper v. Kemper*, 3 Rand. (Va.) 8. The difficulty lies in determining what acts are and what are not unlawful, and the solution of this question must depend upon the facts of each particular case.

It is settled beyond question, that when a sheriff, being about to levy on goods the title to which is doubtful, takes a bond from the execution debtor to indemnify him from the consequences of the act, the bond is valid: *Arundel v. Gardiner*, Cro. Jac. 652; *Plackett v. Gresham*, 3 Salk. 75; *Plackett v. Orisop*, 1 Ld. Raym. 278; *The Queen v. Heathcote*, 10 Mod. 48; *Stanton v.*

McMullen, 7 Ill. App. 326; *Wolfe v. McClure*, 79 Ill. 564; *Anderson v. Burns*, 7 Blackf. 343; *Jones v. Henry*, 3 Litt. 427; *Marsh v. Gold*, 2 Pick. 284; *Train v. Gold*, 5 Id. 380; *Forniquet v. Tegarden*, 24 Miss. 96; *Moore v. Allen*, 25 Id. 363; *Waterman v. Frank*, 21 Mo. 108; *Stewart v. Thomas*, 45 Id. 42; *Flint v. Young*, 70 Id. 221; *Van Cleef v. Fleet*, 15 Johns. 147; *Heimmüller v. Gray*, 44 How. Pr. 260; *Preston v. Yates*, 17 Hun, 192; S. C., 24 Id. 534; *Miller v. Rhoades*, 20 Ohio St. 494; *Loew v. Stocker*, 68 Pa. St. 226; *Jobe v. Sellers*, 9 Humph. 178; *Stevens v. Bransford*, 6 Leigh, 246; *Dadney v. Catlett*, 12 Id. 383; *Aylett v. Roane*, 1 Gratt. 282; *Davis v. Davis*, 2 Id. 363. So a bond given to indemnify a sheriff for applying money levied to the defendant's execution, when there were other executions entitled to priority, is valid: *Shotwell v. Hamblin*, 23 Miss. 156; also a bond to indemnify against a return "ready to satisfy," when in fact the execution has not been levied: *Kemper v. Kemper*, 3 Rand. 8; and a note given to induce a sheriff to relinquish an attachment, is valid: *Foster v. Clark*, 19 Pick. 329; though in *Wright v. Lord Yancy*, 3 Dong. 240, the court was of opinion that a bond to indemnify a sheriff against the consequences of releasing an execution was clearly void.

If the act indemnified against is in violation of the sheriff's duty, the bond is void. Thus where it was given to indemnify him for neglecting his duty, in the service of a precept: *Hodsdon v. Wilkins*, 7 Greenl. 113; or for levying a void execution: *Collier v. Windham*, 27 Ala. 291; or for not returning an execution: *Greenwood v. Colcock*, 2 Bay, 67; or for selling a workhorse exempt by law from levy and sale, and claimed as such by the defendant in execution: *Renfro v. Heard*, 14 Ala. 23; or when given by defendant in an execution, to save him harmless from the consequences of levying on and selling the property of a stranger: *Prewitt v. Garrett*, 6 Id. 128; or for seizing goods conceded to belong to a third person: *Chapman v. Douglas*, 5 Daly, 244; or for selling property levied on in violation of an order enjoining the sale: *Buffendeau v. Brooks*, 28 Cal. 641; or where it is given to indemnify an officer against an escape: *Ayer v. Hutchins*, 4 Mass. 370; *Lourey v. Barney*, 2 D. Chip. 11; or to induce him to discharge a prisoner from custody: *Featherston v. Hutchinson*, Cro. Eliz. 199; *Martin v. Blithman*, Yelv. 197; *Kenworthy v. Stringer*, 27 Ind. 498; *Denny v. Lincoln*, 5 Mass. 385; *Churchill v. Perkins*, Id. 641; *Fanshor v. Stout*, 1 South. 319; *Webbers v. Blunt*, 19 Wend. 188.

Where a servant, at the master's request, trespasses upon the property of another, supposing it to be his master's, the indemnity is valid: *Stone v. Hooker*, 9 Cow. 154; *Allare v. Ouland*, 2 Johns. Cas. 52; and so where one tears down a turnpike gate, at the direction of the overseer of the highways: *Coventry v. Barton*, 17 Johns. 142; S. C., 8 Am. Dec. 376; or removes goods at the employer's request, that belong to a third person, having reasonable grounds to suppose that the employer owned them: *Moore v. Appleton*, 26 Ala. 633; *Avery v. Halsey*, 14 Pick. 174. So an agreement to indemnify one for levying a distress for rent is valid: *Ibbett v. De La Salle*, 6 H. & N. 233; *Jameison v. Calhoun*, 2 Speer, 19; *Davis v. Arledge*, 3 Hill (S. C.), 170; S. C., 30 Am. Dec. 360. And where A. brought B. to an inn, and affirmed to the host that he had arrested B. by virtue of a commission of rebellion, and in consideration that the host would keep B. as a prisoner for one night, he promised to save him harmless, the agreement is valid, and B. having recovered against the host for false imprisonment, the latter may maintain an action on the promise: *Battersby's Case*, Winch, 48. Though where a justice of the peace called upon a person to assist a constable in making an arrest upon a *capias ad satisfaciendum*, stating that such arrest was lawful, and promising to indemnify such person for assisting to make the arrest, and

it turned out that the arrest was illegal, and judgment was obtained against the party assisting for trespass, who then brought suit, it was held the indemnity was illegal, and no action could be maintained upon it: *Cumpston v. Lambert*, 18 Ohio, 81. The court commented on the case of *Battersby*, Winch, 48, *supra* (under the name of *Fletcher v. Harcourt*), which was cited by the counsel for the plaintiff as being directly in point, and approved of the decision, but distinguished it from the case under consideration, as in *Cumpston v. Lambert*, the innkeeper did not, in the first instance, deprive the prisoner of his liberty, and as his business required him to keep all persons who came along, prisoners as well as others. But this case seems to conflict with the case of *Marsh v. Gold*, 2 Pick. 284, where a sheriff had an execution against a corporation, and on the strength of a promise of indemnity from the creditor's attorney, arrested a party, supposing him to be a member of the corporation, though he declared, and subsequently proved, that he was not; and the court held the bond valid. A bond given to indemnify a publisher against the consequences of a libel is invalid: *Shackell v. Roster*, 3 Scott, 59; nor can a servant sustain an action on a bond of indemnity for the damages he has been compelled to pay for an assault and battery he has committed: *Pierson v. Thompson*, 1 Edw. Ch. (N. Y.) 212; and a bond to indemnify against a void bank-note is also void: *Hayden v. Davis*, 3 McLean, 276.

WHERE ACT INDEMNIFIED AGAINST IS ALREADY COMMITTED.—A bond to indemnify against the consequences of an unlawful act already committed is valid: *Hackett v. Tilly*, 11 Mod. 93; *Kneeland v. Rogers*, 2 Hall (N. Y. Sup. Ct.), 579. The reason which declares such contracts void, when the act is to be done, does not apply to cases where the act indemnified against is past, and agreements to indemnify for such acts stand on the same footing as other contracts. Thus a contract to indemnify a sheriff for past neglect is valid: *Hall v. Huntton*, 17 Vt. 244; or for a past attachment: *Knight v. Nelson*, 117 Mass. 458; or levy: *Griffiths v. Hardenbergh*, 41 N. Y. 404; or for an escape already happened: *Given v. Drigge*, 1 Cai. 450; *Doty v. Wilson*, 14 Johns. 378.

POWELL v. MATTHIS ET AL.

[4 FREDELL'S LAW, 83.]

SURETY COULD NOT MAINTAIN ACTION AGAINST CO-SURETY AT LAW formerly in this state; the remedy was in equity.

LIABILITY OF SURETY AT COMMON LAW was his aliquot proportion of the money, ascertained by the number of sureties; the death or insolvency of one of the sureties did not enlarge the other's liabilities.

RULE OF COMMON LAW OF ENGLAND adopted in this state by the act of 1807, R. S., c. 113, sec. 2.

SURETY CAN NOT MAINTAIN JOINT ACTION AGAINST HIS CO-SURETIES at law to recover their share of the liability, but each must be sued separately for his own liability.

PLAINTIFF and defendants were sureties on a note executed by one Carrol. Judgment having been obtained against the sureties and Carrol, who was and still is insolvent, plaintiff paid the amount, and brought a joint action against the defendants for

their proportion. Defendant moved for a nonsuit because the cause of action was several instead of joint. Verdict for plaintiff, but the court being of the opinion that the action was several, set the verdict aside and granted a nonsuit. Plaintiff appealed.

No counsel for the plaintiff.

Reid and Winslow, contra.

By Court, *RURRIN*, C. J. In equity it has always been held, that there should be relief between co-sureties, upon the principle of equality applicable to a common risk; and upon the insolvency of one, the loss has been divided between the others, as being necessary to an equality. The court of equity, from its modes of proceeding and having all the parties before it at once, is able to adjust their rights upon this principle in every case, however complicated by the number of the sureties, or by successive insolvencies. In a single suit everything may be fully investigated—the property of the principal first applied—full or partial indemnities to some of the sureties inquired into and required—and the insolvency of some of the sureties ascertained; and, indeed, the loss of each ascertained, and the proper contribution from each finally and conclusively determined. In many instances, a court of law is incompetent to administer the justice, to which sureties may be entitled as against each other. For that reason, it was formerly held in this state, that the ground of relief in the courts of equity was a pure equity, and not the notion of mutual promises between the co-sureties; and therefore that, at common law, no action would lie for one against another, even where there were but two sureties: *Carrrington v. Carson*, Conf. (N. C.) 216. It is true, that about the same time in 1800, it was held otherwise in England; and an action at law was sustained for one surety, who paid the debt, against another for contribution: *Cowell v. Edwards*, 2 Bos. & Pul. 268. But it was there found necessary to restrict the action to the simple cases where there were but two sureties, or, if there were more than two, to a recovery against each of an aliquot proportion of the money, ascertained by the number of the sureties merely. It was found impossible to carry the doctrine further at law; because courts of law proceed only on contracts, and could not imply, that there was more than the one contract between the sureties, at first entered into, and suppose, contrary to the fact, new ones to spring up with every change of the circumstances of the sureties that might happen, even after the payment of the money by one of them. As far as an aliquot

proportion, according to numbers, the money might be presumed to have been paid to the uses of the sureties severally. But on the insolvency of one of them afterwards, the share of the insolvent could not be made then to change its character, and become money paid to the use or at the request of those who were solvent. The law could not, in such complicated cases, do complete justice by one final determination; and therefore it did not undertake it. And such is still the rule in England: *Browne v. Lee*, 6 Barn. & Cress. 689.

In this state, however, the doctrine has been the subject of legislation, in the act of 1807, R. S., c. 113, sec. 2; and it is to be considered how far that has altered the law, as it previously existed here. It provides, that when the principal is insolvent, one surety, who has paid the debt, may have his action on the case against another, "for a just and ratable proportion of the sum." The purpose of the act was, probably, nothing more than to say, that the rule laid down in *Carrington v. Carson*, that there was no jurisdiction at law in any case, should be law no longer; leaving the question to the courts, what in each case was the "just and ratable proportion," to which, as far as a court of law was competent to ascertain, the party was entitled. It is not unlikely, that a knowledge of the case of *Cowell v. Edwards*, about that time acquired, might have induced the enactment, and that it was intended to transfer its principle and nothing more into the act. At all events, it furnishes no data for determining the proportion, but the number of the sureties; and thus it adopts the rule of that case. The words are: "Where there are two or more sureties, and one may have been compelled to satisfy the contract, he may have his action against the other surety or sureties for a just and ratable proportion of the sum." The proportion here spoken of, is that which arises among the parties to the contracts specified in the first part of the sentence; which are, first, a contract in which there are two sureties; and secondly, a contract in which there are more than two.

In each of those cases, the sureties are to be respectively liable for a ratable proportion; namely, where there are two sureties, for a moiety, and where there are more than two, in a like proportion, that is, according to their number. This construction is rendered the clearer, when attention is drawn to the particular case in which the action is given. It is not in every case, in which a surety makes the payment, but only in that of the insolvency of the principal, or, what is tantamount, his residence

out of the state. Those, and those alone, are the cases within the purview of the act; and upon the supposition of that state of facts, an aliquot part according to numbers, is not only a ratable, but the only just proportion of each surety. Without the insolvency of a surety also, his share can not in any court be imposed on the others. But the act takes no notice, that one or more of the sureties may be insolvent or reside abroad, nor gives an action for rights arising out of that state of things. It is apparent that case was not contemplated by the legislature; and therefore no rate of contribution between the sureties, as affected by the insolvency of one or more of their own body, or indeed by anything else but the insolvency of the principal, was thought of, or is provided for in the act. The object was merely to change the form in the single instance of payment by a surety, who was unable to obtain reimbursement from the principal; and everything else was left as before.

It follows that each surety is liable at law for only his original aliquot part; and, of course, an action can not be brought against two or more jointly, but each must be sued separately for his own liability. Indeed there is another consideration, which renders it perfectly clear, that a joint action can not be maintained; which is, that the plaintiff might thereon raise the whole recovery from one of the defendants, in the first instance, although the other might be solvent—which is wholly inadmissible. Moreover, it would change the ratio of liability even in case of the insolvency of one. For suppose three sureties, A., B., and C., for a debt of three hundred dollars; and that A. pays it and then sues the other two for two hundred dollars. If B. then become insolvent and C. pay the judgment, he would then pay more than his proportion, and have a just claim on A.—to return to him fifty dollars to equalize their loss. But it is an absurdity, that one should recover in one action, what the defendant may have a right to recover back in another action; which shows that no action can be allowed, in which the recovery will not be confined to the sum for which the defendant is liable at all events. Beyond such a liability, justice can be done between persons in this relation only in the court of equity.

Judgment affirmed.

CONTRIBUTION AMONG CO-SURETIES.—Contribution among co-sureties does not arise from any contract between them, but from the principle that equality is equity: *Moore v. Moore*, 15 Am. Dec. 523; and this right exists in favor of one who has paid more than his proportion: *Burrows v. Carnes' Adm'r*, 1 Id. 677; *Henderson v. McDuffee*, 20 Id. 557; *Cage v. Foster*, 26 Id. 265; *Har-*

rierson v. Lane, 27 Id. 607; *Roberts v. Adams*, 31 Id. 694; *Morris v. Evans*, 36 Id. 591; though for limitations upon this right, see *McCormack v. Obannon*, 5 Id. 509; *Waters v. Riley*, 18 Id. 302; *Sherrod v. Woodward*, 25 Id. 714; *Harrierson v. Lane*, 27 Id. 607; *Morrison v. Poyntz*, 32 Id. 92; *McPherson v. Talbott*, Id. 191; *Rainey v. Yarborough*, 38 Id. 681. The principal case was approved in *May v. Smith*, Busb. Eq. 198; and cited to the point that the liability of a surety is different at law and in equity, in *Samuel v. Zachery*, 4 Ired. L. 380.

CONTRIBUTION AMONG JOINT PRINCIPALS, ONE BEING INSOLVENT: See *Henderson v. McDuffee*, 20 Am. Dec. 557, and note, where this subject is discussed.

CONSTRUCTION GIVEN TO ACT OF 1807 BY PRINCIPAL CASE was approved and followed in *Hall v. Robinson*, 8 Ired. L. 59.

HOLLOWELL v. W. C. SKINNER, SENIOR.

[4 IREDELL'S LAW, 165.]

GIFT OF PERSONAL PROPERTY WILL BE PRESUMED when a father places it in the possession of his son and allows him to use it as his own for several years.

IRREGULARITY IN EXECUTION SALE CAN BE TAKEN ADVANTAGE OF only by the owner of the property and those claiming under him.

TROVER for the conversion of certain live stock. Plaintiff claimed as purchaser on execution against W. C. Skinner, jun.; and he alleged that he had demanded possession of the defendant, which was refused. Defendant proved that he had purchased a certain farm with the live stock in question on it; that he put his son, W. C. Skinner, jun., in possession, agreeing to give him half the crop that was on the land, and the whole property if he managed it and conducted himself properly. The son remained in possession for several years, doing as he pleased with the proceeds of the crops, but did not dispose of the other property; the live stock claimed was the same as that on the farm when the son took possession. The defendant contended that there was no gift; and that the execution sale was void, being *en masse*. Verdict for plaintiff. Defendant moved for a new trial; the motion was not granted. The defendant appealed.

Kinney and Iredell, for the plaintiff.

A. Moore, contra.

By Court, RUFFIN, C. J. The opinion of the court is, that upon the defendant's own evidence there is a legal presumption of a gift to his son of the cattle and hogs in controversy. No one can hesitate as to the true nature of the transaction between the defendant and his son, who knows anything of the

ordinary feelings and conduct of parents towards their sons, when come to man's estate, and will look at what took place between these persons. It is preposterous to call a young gentleman his father's overseer, who, upon returning home after completing his education, is put by a wealthy father into possession of a fine estate, properly stocked with slaves, and with the usual supplies of the various kinds of cattle and provisions, which in conversations with his friends and in transactions of business, the father calls his son's, and with which the father does not interfere for nearly four years. On the contrary, during all that period, the son acts in the management of the estate and in the use of everything made or being on it, as if they were his own; disposing of all the crops and profits, and they, too, were of great value, at his own will and to his own use. It is true, the land and slaves did not become his; because they do not pass but by deed or writing. But before the act of 1816 the slaves would have been the son's property; and even since that act, if young Mr. Skinner had remained in possession of them, until his father's death, intestate, they would have been his, as an advancement from the beginning: *Stallings v. Stallings*, 1 Dev. Eq. 298. It was among our earliest reported adjudications, that if, when a child went to house-keeping, a parent put a slave or other chattel into the child's possession, the property was to be deemed in the possessor. The soundness of the principle consists in its certain conformity to the intentions of almost all men under such circumstances, and by its necessity, as a protection to children in bestowing care and labor on what can not be taken from them, and as a protection also to persons dealing with the children. In *Furrel v. Perry*, 1 Hayw. 2, Judge Williams laid down the rule, that putting a chattel into a child's possession is a gift in law, unless the contrary be proven; and one of the reasons for it was, that otherwise creditors might be drawn in by false appearances. The same reasoning is given more at large in the subsequent case of *Carter v. Ruiland*, 1 Id. 97; where it is said, that when the possession remains with the child for a considerable time, it will be necessary for the father to prove very clearly, that it was expressly and notoriously understood not to be a gift; and, further, that the peace of families and the security of creditors were greatly concerned in the law being thus settled.

To no case could those reasons be more applicable than to the present. The only thing that is supposed to qualify the legal inference from the son's possession, that there was a gift, is, that

when the father put the son into possession and gave him half the crop then growing, he added, "and he would give him the property, if he found he knew how to manage it, and conducted himself properly." But that does not repel, but rather fortifies, the legal presumption, that both the father and son, as well as the rest of the world, considered the crops and the various kinds of stock, except the slaves, the property of the son. It is expressly stated, that the son made what use of the crops he thought proper, and appropriated them to his own use. That was for three or four years; and during the same time the stock also remained in his possession, without any complaint of his son's conduct or claim of property by the father, but on the contrary, with repeated declarations, that he had given all that property to his son, and that it was liable to his debts. How can it be pretended to the contrary? A father may lend his son the use of land and negroes; but who can suppose, that any one would ever think of borrowing for four years a stock of sheep, hogs, and cows, with a view of returning the same specifically, or accounting for the increase? Nothing of the kind was contemplated in this case; for the son must have killed the original stock or most of it for sale or consumption, and bred more upon his own provisions and with his own care. The discovery of the son's embarrassments induced the defendant to resume the possession of the land and negroes, and tempted him also to claim again the other chattels, as being in some sort appurtenant to the plantation. But, until that discovery, all parties regarded them as an advancement to the son, and, therefore, as his property, and although the land and negroes might be resumed, the other chattels could not, to the prejudice of the son and his creditors.

In our opinion, therefore, the jury ought to have been instructed that the property was in the son, and consequently passed to the plaintiff by the sheriff's sale. That conclusion renders it, perhaps, unnecessary to consider, whether the subsequent observations to the jury were correct or not; since, even if they be erroneous, the verdict being right in point of law, upon the whole case, ought not to be disturbed: *Atkinson v. Clarke*, 3 Dev. 171. Yet, as we do not concur in those observations, and the contrary might be inferred from our silence, it seems to be incumbent on us to state the opinion entertained by the court.

The learned judge, upon the assumption that there had been no gift, gave it as his opinion, that, if the defendant knew his

son was obtaining credit upon the faith of this property, and took no steps to correct the mistake, but suffered his son to go on in obtaining a false credit, the father would not be permitted to set up his title against the plaintiff; provided, however, the debt, for which the sale to the plaintiff was made, was in fact contracted on the faith of this property. For imposition on particular creditors by false representations of the son's credit, the defendant might be made liable in a proper action. But even an express fraud of that kind would not work a change of property, so as to render what was really the property of the father subject to an execution against the son. If this was a loan and not a gift to the son, we think the defendant would have been entitled to a verdict. In our opinion, indeed, the law is clear, that it was a gift. But that is not on the ground of actual deception on particular persons, as to whom, and not as to others, it is to be deemed the son's property. The rule rests on the tendency to deceive the world, arising out of a long unqualified possession of chattels derived from a father by a child on settling in life. To counteract that tendency, as a general mischief, is one among several sufficient reasons for the presumption of a gift, where it does not appear that it was expressly a loan. If obtaining false credit with particular persons, on the faith of property in the son's possession, would make a *quasi* estoppel on the father against claiming it, the cases of express loans, and of slaves even, would be within the rule; as, we suppose, they unquestionably are not. Our view is, that a possession of a chattel by the child under the father, not expressly as a loan, is evidence in law, that there was really a gift—as is known to be the actual intent of the parent in a vast majority of the instances, in which a child receives such things from a parent.

If the property was in the son, the defendant is not concerned whether the sheriff conducted the sale properly or not. The son, and those claiming under him, can alone make the objection.

Judgment affirmed.

PRESUMPTION OF A GIFT ARISES when a parent delivers property to a child and allows it to remain in his possession: *Fitzhugh v. Anderson*, 3 Am. Dec. 625; *De Graffenreid v. Mitchell*, 15 Id. 648. The principal case was referred to with approval in *McMeeley v. Hart*, 8 Ired. L. 493. See also the case of *Skinner v. Skinner*, 4 Id. 175, which grew out of the same transaction as the principal case.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

SMITH v. BEATTY.

[2 BREKILL'S EQUITY, 456.]

WEAKNESS OF MIND ALONE IN PARTY CONTRACTING, without fraud, is not sufficient ground to invalidate an instrument.

OLD AGE ALONE IS NOT A GROUND FOR INVALIDATING CONTRACT unless combined with weakness of mind and fraud.

VENDEE IS NOT BOUND TO DISCLOSE THE FACT that there is a gold mine on the land sold, though, if, on being interrogated as to that, he denies all knowledge, the denial will be a fraud.

APPEAL from an interlocutory order, directing the injunction which had been obtained in the case to be continued until the hearing. Plaintiff alleged that he was very old, and unable to make a contract, and given to an immoderate use of liquor; that defendant being aware of this, and that there was a rich gold mine on plaintiff's land, of which the plaintiff was ignorant, got him intoxicated, when his son, with whom he lived, was away, and obtained a lease of the land from him, the rent to be a tenth of the gold obtained. The bill further charged that the defendant represented that he was about to endeavor to find out whether there was gold on the land, when in reality he had already picked up considerable on the surface; and that, on interrogation, he denied finding gold on the land, and expressed himself as doubtful whether there was any. The bill prayed an injunction to restrain defendant from working the land (which was granted by a judge out of court), and that the lease, having been obtained by fraud, be surrendered up. The defendant, in his answer, denied all the allegations of the bill, except that

he admits finding a few pennyweights of gold on the land prior to the lease; but he denies being interrogated as to whether he had found gold, or that he had ever said there was no gold on the land. He states that the lease was attested by two respectable witnesses; and that the customary rent of surface mines is from one sixth to one fifteenth of the product; that he has tendered plaintiff all the rent due him; he denies all fraud, etc. After the answer had been filed, the defendant moved the court to dissolve the injunction; the motion was denied, and the injunction ordered to be continued to the hearing. By leave of the court, the defendant appealed.

Alexander, Hoke, and Osborne, for the plaintiff.

Caldwell, contra.

By Court, DANIEL, J. Weakness of mind alone, without fraud, does not appear to be a sufficient ground to invalidate an instrument. It is said that a court of equity will not measure the size of people's understandings or capacities: 1 Madd. Ch. Pr. 280. Excessive old age, with weakness of mind, may be a ground for setting aside a conveyance obtained under such circumstances. But old age alone, without some proofs of fraud, will not invalidate a transaction: Id. 283. The answer denies that the plaintiff was incapable to contract when the lease was made, either from old age or intoxication. A vendee, who knows that there is a gold mine on the land, is not compelled to disclose that fact to the vendor. But, if he is interrogated as to his knowledge of such a thing, and he then denies any knowledge of the mine, this denial will make the transaction fraudulent. The defendant admits that he had picked up some gold on the land before the lease was executed, and he does not state in his answer that he disclosed that fact to the lessor. But he expressly denies that he was ever interrogated by any one on that subject, or ever made any false representations concerning the gold so by him picked up.

The nature of the rent reserved in the lease clearly shows the lessor knew for what purpose the lease was taken by the lessee. It seems to us that the defendant has fully and fairly answered every material charge and allegation in the bill; and that he has expressly denied every charge, which, if undenied, would authorize a court of equity to declare the lease fraudulent. We therefore think, that the order made by the court below, continuing the injunction to the hearing of the cause, was erroneous, and that the injunction should have been dissolved.

Order to be certified accordingly.

AGE OR MENTAL WEAKNESS AS AFFECTING POWER TO CONTRACT.—Imbecility or weakness of understanding, not amounting to idiocy or lunacy, is not sufficient ground to avoid a deed at law, though the grantor may have been a fit subject for a commission in the nature of a writ *de lunatico inquiringdo*: *Jackson v. King*, 15 Am. Dec. 354. But there must be an absence of fraud, and if there be unfairness in the transaction, the mental imbecility of the party may be taken into the account to show such fraud as will annul the contract: *Owings' Case*, 17 Id. 311. The principal case was cited as authority on the question as to whether mental weakness was sufficient to invalidate a contract, in *Suttlis v. Hay*, 6 Ired. Eq. 127, and *Harthy v. Estie*, Phill. Eq. 167.

McLURE v. BENCENI.

[2 IREDELL'S EQUITY, 513.]

CREDITOR BY JUDGMENT IN ANOTHER STATE, against a citizen of the same state, can not come into this state for satisfaction out of the debtor's property, situated here.

JUDGMENT OF COURT OF ONE STATE IS DEEMED VALID and conclusive in the courts of a sister state.

IDEM—COURTS WILL AID EXECUTION OF FOREIGN JUDGMENT by receiving it as evidence of a debt, or of property, when it is made the subject of direct action or defense in those courts, and in no other manner.

IDEM—JUDGMENT OF SISTER STATE CAN NOT BE ENFORCED HERE by process of execution issued by our courts in the first instance, for the defendant has a right to contest the fact whether it be a judgment in another state or not.

EQUITY IS ANCILLARY TO LAW IN AIDING CREDITORS by judgment and execution in our own courts, where it is necessary for their satisfaction.

EQUITY WILL NOT INTERPOSE TO AID CREDITORS by a foreign judgment on the ground of necessity, where the necessity arises from a defect in the law of the country to which all the parties belong.

APPEALS both by the plaintiff and some of the defendants from an interlocutory order. Plaintiff alleged in his bill that all the parties are citizens of South Carolina, except Benceni; that he obtained a judgment against D. Thomas, the elder; that Thomas was in possession of certain slaves, and to defeat the execution of the judgment, and by means of covering them with a pretended incumbrance in this state, he and his children, by an arrangement with Benceni, removed the slaves to this state, where they were attached by Benceni for a debt alleged to be due him; that this debt was fictitious, and contrived for the purpose of defeating plaintiff's claim. The bill further alleges that the slaves are claimed by the children under a conveyance from their father, but charges that the conveyance was voluntary and without consideration, and made many years ago, when the children were infants, since which time the father had con-

tinued to possess and use the slaves. The bill prayed a discovery, and that an account be had between Thomas, the elder, and Benceni, and if any balance be found in the latter's favor, that it be paid, and that then the negroes be condemned to satisfy plaintiff's claim. The defendants answered separately, denying any collusion. The children of Thomas specially allege, after denying the collusion, that the negroes belong to them by a deed of conveyance from the father, who had advanced his other children in a similar manner; and that they removed the slaves from the state, so as to avoid the seizure, and thus escape litigation. Benceni also, after denying collusion, alleges that he attached the slaves believing them to be the property of Thomas the elder, and then sets forth a claim against him, on which the attachment was levied. An order of sequestration was made and a writ issued, when the bill was filed. The defendants, after answering, moved respectively to discharge that order, and set the negroes at large; the motion was granted as to Benceni, but refused as to the other defendants, and the order was continued till the hearing. The plaintiff appealed from the part of the decree in favor of Benceni, and the children of Thomas appealed from the residue.

Alexander, for the plaintiff.

Caldwell and Boyden, *contra*.

By Court, RUFFIN, C. J. The question raised by these appeals is, whether the plaintiff has such an interest in the slaves in controversy, or has stated such a case as authorizes the court to interfere with the possession of them by the defendants, or to interrupt legal proceedings between the defendants themselves, for the purposes respectively of asserting a title to the slaves in some of the defendants, or of asserting by another a right to satisfaction out of them for the debt of yet another of the defendants, by laying hold of the property and bringing it into this court.

As between the plaintiff and Benceni separately, there would seem clearly to be no ground for the interposition of the court of equity. They both claim as creditors of the same person, each insisting that the negroes are the property of that person, and liable for his debts. Even if it were true, that the negroes were brought into this state at the instance of Benceni, in order that he might gain a preference over the plaintiff by attaching here before the other could seize in South Carolina, there would be nothing for the cognizance of this court. It would be simply

a case of legal priority, obtained by a vigilant creditor, against which equity could not relieve at the instance of a less active creditor, who had no specific title or lien on this property. But all agency on the part of Benceni in getting the negroes here is denied, and it seems he owes his priority to good luck rather than any foresight of his own. The plaintiff, therefore, has nothing but his own want of diligence to find fault with upon this part of the case. How far the court of equity might go in relieving at the instance of a creditor by judgment and execution against an attachment, upon the ground that the debt therein demanded was not real, and that the process was sued out and kept on foot collusively for the purpose of covering the property and withdrawing it from the reach of just creditors, we do not think it necessary to say definitely. Probably the nature of the debt and the fraudulent purpose might be inquired into, in the same manner and for the same purpose, as if the proofs, instead of being an attachment, were an execution on a fraudulent judgment. But in this case the debt appears to be due to Benceni in the first place, and, in the next, all concert between that party and all the others is denied; and it is evident that, whether the debt be owing or not, Benceni really claims it as against his alleged debtor, and that his attachment is a *bona fide* litigation to obtain satisfaction out of this property, as against all the other parties, plaintiff and defendants. There is then no principle, on which the jurisdiction can be changed, or an impediment thrown in the way of this defendant in prosecuting his legal remedy, and keeping all the advantages which he thereby has at law. Upon this ground alone, therefore, the court would hold, that there was no error in so much of the decree as the plaintiff appealed from, and order it to stand affirmed, with costs to Benceni. But, in truth, the cause, as between these parties, need not be determined on those particular circumstances, but falls within a general principle, on which the whole case must be decided against the plaintiff, as we think.

The general principle alluded to is this: that a creditor, by judgment in another state, against a citizen of the same state, can not come into this state for satisfaction out of the debtor's property, situated here. We do not take notice of claim set up to the negroes by the children under the father's gift; because assuming them to belong to the father, the plaintiff can not reach them in this way. The proceeding is *primæ impressionis*. We are not informed of anything, that can be made to serve as a precedent; though, doubtless, the case has occurred in very

many instances, where the debtor had no property in the state in which the judgment was rendered, but it was removed into, or before was situate in another state; and attempts like the present would have been often made, if they could have been carried through. It is true, the judgment of the court of one state is deemed valid and conclusive in the courts of a sister state. What was done under a judgment in the state, in which it was rendered, is sustained by them, if brought into litigation in the courts of another state. So the latter courts will aid in its execution, when necessary to render it effectual. But they give such aid in its execution by receiving it as evidence of a debt, or of property, when it is made the direct subject of action or of defense in those courts; and in no other manner. At least we are not aware of any case, in which the court of one state has undertaken to give an extraordinary remedy to a creditor, by judgment in another state, merely on the ground, that the laws of his own state did not furnish an effectual remedy. If such be the fact, he must look to his own domestic authorities to alter and amend their laws, and not to the tribunals of another state to supply that want of an effectual remedy. But every country must be presumed a competent judge of the justice due between its own citizens, and to provide effectual means for administering it. Therefore, if these negroes be the property of Daniel Thomas the elder, and were subject to the plaintiff's satisfaction, it can not be supposed that the law of South Carolina will not, in some manner, compel him to assign them to the plaintiff, or to some officer of the law, to dispose of and apply the proceeds for the benefit of the plaintiff and his other creditors. So if the children of Thomas have done the plaintiff a wrong in removing the negroes, it is a wrong, made so by the laws of South Carolina, and perpetrated there by her own citizens, who must be taken to be duly amenable to her laws. Hence there is no reason for the interference of our courts between persons, all of whom are alien to our laws and tribunals, and have access to their native institutions. It may be here observed, that in this spirit is our attachment law conceived; which gives not that remedy against a person residing in another government to another person also residing in another government. We believe, that a similar provision is found in the codes of all the states, which give the process of attachment; and it proceeds on the idea, that it is not incumbent upon one state to administer justice between citizens and inhabitants of other states, but recourse may be had to the country having jurisdiction over the persons.

A judgment in another state can not be enforced here, by process of execution issued by our courts in the first instance; for the defendant has a right to contest the fact, whether it be a judgment in another state or not. Therefore, it must be made the subject of an action here, and the demand become due by a judgment of our courts, before the party can have execution here.

We entertain that jurisdiction, because the party has come within the state; and we execute against him our own judgment. But as we can not execute a judgment abroad by process here at law, so it seems necessarily to follow, that a court of equity here ought not to condemn property that it can lay hold of for the satisfaction of such a judgment. Equity is ancillary to the law in aiding creditors by judgment and execution in our own courts, where it is necessary for their satisfaction. But then the persons and property are within the state, and no jurisdiction is arrogated over persons or things abroad. The interposition of the court is here invoked upon the same plea of necessity. But it is not a similar necessity; nor one that can be admitted to exist. The supposed necessity consists in a defect imputed to the law of the country to which all the parties belong, in not providing against the power of a debtor to put his property out of the way of his creditor, or in not compelling him to produce it or make it subject to the debt, or in not giving just redress against third persons, who have aided the debtor in such his wrongful acts. It may be, that the law of South Carolina is lame in all these particulars, and that help from some other quarter is necessary. But we can not believe, that by process against the body or some other means, the creditor can not have due redress in his own state. If, however, it should be otherwise, the necessity of the plaintiff's case calls for legislative assistance at home, and can not instigate the judicial tribunals of this state to enforce a judgment not rendered here, and against a person not resident within our jurisdiction.

Our opinion, therefore, is, that so much of the decree as continued the order of sequestration against any of the defendants was erroneous, and ought to be reversed, with costs to the defendants. All which must be certified to the court of equity.

Ordered accordingly.

JUDGMENTS OF SISTER STATES, EFFECT OF: See note to *Bartlet v. Knight*, 2 Am. Dec. 36, discussing this subject; also *Wernwag v. Pawling*, 25 Id. 317; *Fletcher v. Ferrel*, 35 Id. 143, the notes to which refer to other cases in this series.

KEE v. VASSER.

[2 IREDELL'S EQUITY, 553.]

WIFE CAN NOT ACQUIRE SEPARATE PROPERTY FROM HER HUSBAND in her savings, out of a voluntary allowance from her husband, except by a clear, irrevocable gift, either to some person, as a trustee, or by some clear and distinct act of his, by which he divests himself of the property.

WIFE'S SAVINGS ARE HER SEPARATE PROPERTY, when the husband acknowledges at sundry times that they are her separate property; and they keep separate accounts at neighboring stores; and a loan of the savings is made by her, with her husband's consent, and a bond for the same taken in her name; and the husband himself borrows money from the wife.

At spring term, 1843, of the Northampton equity court, this cause was set for hearing, and ordered, by consent of the parties, to be transmitted to the supreme court. The opinion states the case.

B. F. Moore, for the plaintiff.

Bragg, *contra*.

By Court, DANIEL, J. The plaintiff in his bill states that the defendant, Nancy, was the widow of his testator, John Croker. That she, before and after the death of the said testator, got into her possession large sums of money and evidences of debt, belonging to the estate of his testator, to the amount of one thousand dollars, or upwards; that the said Nancy has since intermarried with the other defendant, James Vasser, and that the said Vasser has got into his hands much, if not all, of said moneys, and now refuses to surrender the same, or in any manner to account with him for the same. The defendant, Nancy Vasser, in her answer, states that she has surrendered to the plaintiff, as the executor of John Croker, everything of which she has had the possession or control, which in law or equity, as she is advised, he had any right or claim to. This defendant further states that the testator gave her two notes against two merchants, one against one Southall for eighteen dollars, or thereabouts, and the other against one Clark, for the purpose of discharging the separate account these men had against her in their stores: and that these were all the evidences of debt that this defendant ever had of the testator's: that she being so advised, returned these notes to the plaintiff. This defendant sayeth, that before she married Croker, who was a man of a large estate, she was a poor widow with two children, by the name of Whitehead. That he, Croker, gave her, to her own sole and separate use and benefit (to enable her to maintain the said two children), what money she could make by the use of her needle (she being a good tailoress),

the sale of fowls, eggs, butter, and vegetables from their garden: that Croker always recognized this money as belonging to her, and they two kept separate store accounts: that in the course of many years (living between the Petersburg and Portsmouth railroads, and near to each), she was enabled to save the sum of about three hundred and fifty dollars: that she was in the habit of loaning this money, and taking the bonds in her own name, with the approbation of her husband. She further states that the present plaintiff has paid to her the purchase money (about three hundred dollars), of a small tract of land, which belonged to her first husband, and afterwards became the property of Croker, and which Croker had sold to the plaintiff, taking the bonds therefor payable to her two Whitehead children. Both these sums, with what she has saved since the death of Croker, amounting in all to about the sum of seven hundred and thirty dollars, which the other defendant, James Vasser, admits came to his hands since the marriage: and he says that he has executed a bond to pay five hundred dollars to each of the two Whitehead children when they come of age, and to furnish each with a horse, saddle, and bridle. They deny receiving of Croker's estate any money or evidences of debt, except as above stated. There was a replication to the answers.

We are glad to see that the testimony in this cause has been well taken. And we must say that it substantially supports the statements made in the answers. There are species of allowance to the wife by the husband, which may be classed under the head of pin-money. It is, where he permits his wife to have and make of certain articles of his property, either for her own use, or in consideration of her supplying the family with particular kinds of necessaries, or when he makes to her a yearly allowance for keeping his house. The profits in the first case, and the savings in the other, will, in equity, be considered as the wife's own separate estate, although, at law, they belong to the husband, upon the principle that all the personal property which a married woman acquires is that of her husband. A leading case on this subject is *Slanning v. Style*, 3 P. Wms. 337; *vide also Sir Paul Neal's Case*, Prec. Ch. 44, cited in *Herbert v. Herbert*; *Lady Tirrell's Case*, 2 Eq. Ca. Abr. 155; 2 Roper on Husb. and W. 138. After marriage, the husband may permit his wife to carry on a separate trade, and all that she earns in the trade, will, in equity, be her separate property, and be applicable and disposable by her, as such, subject to the demands affecting it: 2 Roper on Husb. and W. 171.

It is true, that the courts of equity in modern times have laid down the principle, that a wife can not acquire separate property from her husband, in her savings, out of a voluntary allowance from her husband, except by a clear irrevocable gift, either to some person as a trustee, or by some clear and distinct act of his, by which he divests himself of the property: *McLean v. Longlands*, 5 Ves. 79. See *Waller v. Hodge*, 2 Swans. 97; 2 Roper on Husb. & W. 140, note c, Jacob's ed. In this case, the proof is, that Croker acknowledged at sundry times, that the savings were the separate property of his wife. They had separate accounts at the stores of their neighboring merchants—when a borrower of money applied to him for a loan, he said he had none to lend, but his wife had—the loan was made by her to the borrower in the presence of her husband, and the bond was taken for the same in her name and with his consent. The husband himself also borrowed money of his wife, to loan to his overseer, which money was by the plaintiff's consent, returned to her since the death of the husband. The proofs in the case, in our opinion, come up to these requirements.

We are of the opinion that the bill is not supported by proofs, and it must be dismissed with costs.

Bill dismissed with costs.

WIFE'S SEPARATE PROPERTY, WHAT IS: See *Butler v. Buckingham*, 5 Am. Dec. 174; *Rouquier v. Rouquier*, 16 Id. 186; *Starrett v. Wynn*, 17 Id. 654; *Sharp v. Wickliffe*, 14 Id. 37; *Emery v. Neighbour*, 11 Id. 541; *Boykin v. Oplea*, 29 Id. 67; *Hamilton v. Bishop*, Id. 101; *Carroll v. Lee*, 22 Id. 350; *Parsons v. Parsons*, 32 Id. 362; *Yardly v. Roub*, 34 Id. 535; *Miller v. Bingham*, 36 Id. 58; *McKenna v. Phelps*, 37 Id. 438; *Campbell v. Wallace*, Id. 219; *Allen v. Allen*, 39 Id. 553. The principal case was referred to in *McKinnon v. McDonald*, 4 Jones' Eq. 8, but distinguished from that case, as there there was an attempt to charge land, standing in the name of the wife and purchased with her earnings, on an execution against her husband.

FREEMAN v. EATMAN.

[3 INDELL'S EQUITY, 81.]

VOLUNTARY CONVEYANCE FROM FATHER TO SON IS VOID as to subsequent *bona fide* purchasers from the father without notice.

IDEM.—By the act of 27 Eliz., c. 4, a voluntary conveyance, though made for the purpose of providing for a wife or children, is void as against a subsequent purchaser, for a fair price, though with notice of the prior conveyance.

BILL for a specific performance, alleging that plaintiff and defendant entered into an agreement by which defendant was to

purchase the tract of land in question; that defendant went into possession under this agreement, but when plaintiff offered to execute the contract by having the land surveyed and a deed made, the defendant refused to take any further steps in the matter, giving for a reason that the plaintiff could not make a good title. The bill set forth that one Morris had formerly been in possession of the land, and had conveyed it, in consideration of one dollar, to his children; that he had afterwards conveyed it to one Harrell, and by Harrell it had been conveyed to the plaintiff. Neither Harrell nor the plaintiff had notice, actual or constructive, of the conveyance by Morris to his children, and both had paid a fair price for the land. The defendant admitted these facts, and by consent the cause was transmitted from the Wake county court of equity to the supreme court.

Badger, for the plaintiff.

Whitaker, *contra*.

By Court, RUFFIN, C. J. The parties are agreed as to the state of the title as respects the facts, and it is particularly set forth in the pleadings. The defendant's objection to carrying into effect his contract of purchase is, that in point of law the plaintiff can not make him a good title. That depends upon the operation of the deed made in November, 1833, by Mr. Morris to his four sons, as against the plaintiff and his vendor, Harrell; who were both purchasers for full value paid and took conveyances in fee, without any notice of the deed to the sons. That deed is expressed to be made for love and affection, and one dollar, and purports to convey the land to the sons at the death of the father. The pecuniary part of the consideration is so obviously nominal and colorable, that the deed must be regarded as founded on blood only, and the instrument is, therefore, really a voluntary covenant of the father to stand seised to his own use during his life and afterward to the use of his sons. The opinion of the court is, that as a conveyance to the sons, it is void as against the subsequent purchasers for a valuable consideration, without notice; and therefore, that the plaintiff is able to make to the defendant a good title.

Whatever doubt may be entertained, whether the purposes or the language of the act of 27 Eliz., c. 4, authorized the construction, we conceive, that, before our act of 1840, c. 28, it was settled so firmly as not to be shaken by any authority but that of the legislature, that a voluntary conveyance, though for the meritorious purpose of providing for a wife or children, is, by

that statute, made fraudulent and void against a subsequent purchaser for a fair price, though with notice of the prior conveyance. It was held that notice made no difference; because, if the purchaser knows of the deed, he knows also that by law it is void: *Gooch's Case*, 5 Rep. 60. The doctrine has in more recent periods been several times much discussed and confirmed. At law there are the cases of *Doe v. Martyr*, 1 Bos. & Pul. N. R. 332; *Doe v. Manning*, 9 East, 59; and *Hill v. Bishop of Exeter*, 2 Taunt. 69. It never has been doubted, that a purchaser without notice was within the meaning of the act, for upon such a purchaser the fraud is actual. The struggle was, whether one, who had notice of a prior deed before he bought, could or should be also said to be defrauded by it. As it has been just remarked, it was held at law in the cases cited and others, that notice did not prevent the operation of the statute. To the same effect there are also many cases in equity: *Evelyn v. Templar*, 2 Bro. C. C. 148; *Taylor v. Stile*, stated in 2 Sug. Vend. 160.

In *Pulvertoft v. Pulvertoft*, 18 Ves. 84, Lord Eldon held, that a husband, who after marriage made a fair settlement on his wife, could not at her instance be restrained from selling the estate; because under the act the purchaser, though with notice, would get a good title, and, consequently, it could not be against conscience to do what the statute sanctioned. And afterwards the purchaser of the estate in controversy in that suit, who bought and took his conveyance *pendente lite* and who was under the necessity of going into equity, because the wife had the possession of the land and title deeds, and was threatening to fell timber, was relieved by Lord Eldon by having a receiver appointed before answer, which his lordship put expressly on the ground, that the voluntary settlement gave no title whatsoever against the purchaser: *Metcalf v. Pulvertoft*, 1 Ves. & B. 180. In his judgment Lord Eldon relied on, and must be considered as approving, the previous decision of Sir William Grant in *Buckle v. Mitchell*, 18 Ves. 100; which is a very strong case indeed. It was there decided, that a voluntary settlement is void, not only as against a purchaser who is so by conveyance, but also as to one, whose purchase rests in articles; and such a purchaser had, upon his bill, a decree for specific performance against his vendor, and those claiming beneficially under the settlement, and the trustees in whom the legal estate was vested. Sir William Grant said, the construction of the statute was settled at law; and that it must receive the same

construction and produce the same effect in a court of equity as in a court of law. Therefore, the purchaser of an equitable estate ought no more to be affected by a voluntary settlement, than the purchaser of the legal estate; for the party having the equitable title is in equity to most purposes considered as the complete owner of the estate. The same doctrine has been held by this court: *Clanton v. Burges*, 2 Dev. Eq. 13.

The foregoing cases, most of them, need not have been cited for the purposes of the question now before the court, since there are here both an innocent purchase, without notice, for full value, and an actual conveyance from the former owner, who was still in possession. But those cases have been adverted to as clearly showing, that even when the contract is executory and the purchaser is informed of a prior meritorious settlement, that settlement is made a nullity as against the purchaser, who has a right to call for the legal title. It follows, of necessity, that there can be no question of the title now under consideration, even if no actual fraud were contemplated by Morris and his sons. There must therefore be the usual decree for specific performance of the contract.

Decree accordingly.

VOLUNTARY CONVEYANCE, EFFECT OF, ON SUBSEQUENT PURCHASERS HAVING NOTICE OF PRIOR DEED.—This subject was discussed, and the American cases were referred to, in the note to *Jenkins v. Clement*, 14 Am. Dec. 708. The conclusion there arrived at was, that there was a difference between the English and the American rule; that while in England a subsequent purchaser from one who had previously conveyed the land voluntarily would hold against such donee, whether he had notice of the prior conveyance or not, in America such subsequent conveyance was invalid to one having notice, unless the prior conveyance was actually fraudulent. May, in his work on *Fraudulent Conveyances*, comes to the same conclusion: Part 3, c. 1, p. 170, *et seq.*

CRUMP v. MORGAN.

[3 IRDELL'S EQUITY, 91.]

MARRIAGE OF LUNATIC IS ABSOLUTELY VOID.

CANON AND CIVIL LAWS ARE PARTS OF THE COMMON LAW, as they are administered by the ecclesiastical courts.

COURT HAS NO DISCRETION TO REFUSE DECREE, on the hearing, when a party can legally demand it.

ACTION TO NULLIFY MARRIAGE ON THE GROUND OF INSANITY may be brought in the name of the lunatic, by her committee.

BILL to have a marriage declared null and void, by Letitia Crump, acting by her committee, R. D. Lindsay, against Henry

Morgan, the pretended husband. The bill alleges that the complainant had, many years ago, married with Colonel Crump, by whom she had children; that after the birth of the last, symptoms of insanity became manifest, becoming more frequent as time elapsed, until, in 1838, she was declared to be incapable of managing her own affairs, and her husband, in the mean time, having died, leaving her considerable estate, her brother, R. D. Lindsay, was appointed her guardian and committee; that he placed her in charge of Mr. Harris, and Mr. Harris, being about to entertain some company, gave her over temporarily to a Mrs. Palmer, and the latter, having occasion to leave home the following Sunday, took Mrs. Crump to the house of Charles Morgan, the father of the defendant; that defendant, a young man but little over twenty, that day, by the aid of his family, prevailed on her to marry him; that she was held under guard until a license could be procured, and they were married next day by a justice of the peace, without the knowledge of any of her friends or relatives; that plaintiff has been a lunatic ever since. Defendant admits the attacks of insanity, but alleges that she had lucid intervals, and that the marriage was performed during one of these, the plaintiff understanding it, and assenting to it; denies restraint, or base motives, or using undue influence, and alleges that he was actuated by real regard for the plaintiff; he admits that he gave orders not to surrender her up to any one, but that was because Mrs. Crump had fears lest she might be demanded by Mr. Harris, and that he, fearing some such interference, walked a long distance in the night, to secure the services of a magistrate, and to procure a license; that they were married next day. The case was, by consent, transferred from the equity court of Montgomery county to the supreme court.

Badger and Mendenhall, for the plaintiff.

Strange, contra.

By Court, RUFFIN, C. J. It is not usual for the court to discuss evidence in detail; and to every one conversant with the proofs in this cause the reasons will be obvious, why we should decline it upon this occasion. It is sufficient to state its effect to be fully to sustain, and even more than sustain, the statements in the bill. Upon the questions of fact there is not the slightest doubt. There is a vast mass of depositions; and all of them, including even those of the defendant, and we may almost say the answer too, taken as a whole, establish incontestably the want of capacity in this woman to make any contract, or do

any act requiring reason. From the birth of the last child of the first marriage, she was subject to frequent fits of lunacy. The paroxysms became more and more frequent, and more and more violent, until her reason seems almost to have become entirely extinguished, leaving, however, her bodily health good and her sensual appetites inflamed and uncontrolled. Her moral principles and sentiments declined with the decay of her mental faculties. Once a well-bred and virtuous young woman, and then an exemplary matron, she soon lost, after these attacks, the characteristic delicacy of her sex, and seemed literally to be possessed with a fury of animal passion. With a view to its gratification, she constantly, forgetful or insensible of the death of her husband, invoked his return. She was considered and treated by all as an insane person, and she acted as if she was always insane. She conducted no household affairs, performed no maternal duties, professed no maternal affections. No one gives the particulars of a single rational and connected conversation, sustained for a moderate length of time. The answer states that she had lucid intervals, and that in one of them she was courted and married by the defendant. But no one else thought she was then of sound mind, though not reduced to a state in which her mind was so extinguished as to present to a stranger the idea of never having had any. The courtship and marriage may, under the circumstances, be called acts of madness in themselves; and must satisfy any one that the defendant was fully aware of her state. Not one word appears ever to have been exchanged between these persons, until the hour of their engagement; and their ages and conditions in life were also unsuitable. The subsequent indecent hurry in having the ceremony performed, and the reasons for it, as admitted in the answer, are perfectly convincing of the views the defendant and his family took of her state. It is true, restraint is denied; but even in that, the case is proved to be otherwise. Mrs. Palmer went for Mrs. Crump; but was refused access to her, and could only see her through the window of a room, in which she was shut up. That lady sent immediately to Mr. Harris, to advise him of her suspicions, and he hastened to the scene of action, but did not arrive until the marriage had been just concluded. But a circumstance then occurred that leaves no doubt of her want of reason at the time. In the moment of taking a second husband, she invoked the return of the first. "I wish," she said, "the colonel would come." It is true, this person was not always in a frenzy. But though sometimes calmer in her passions than

at other times, she has never been sound in her mind since 1837, at the nearest. Her reason has never existed in its integrity for even the shortest intervals, as far as we can discover.

Indeed, the case was not much contested on the fact of insanity; but the defense was placed on certain legal positions, which will now be considered. It was contended, with much zeal, that the relief can not be granted, because the marriage of a lunatic is valid in law. There is no doubt that at one period such a notion of the common law was entertained. Perhaps it was an instance of the absurd rule, that a person should not be allowed to stultify himself; or, perhaps, according to the conjecture expressed by Sir William Scott, in *Turner v. Meyers*, 1 Hag. Con. 414, it might have been founded on some notion of marriage being a sacrament, and thence deriving a spiritual obligation, independent of the acts of the parties. But, to whatever the rule may have owed its origin, we must at this day feel astonishment that it should ever have existed, and say, with the great commentator, "A strange determination! since consent is requisite to matrimony:" 1 Bl. Com. 438. This court has recently held, *Johnson v. Kincade*, 2 Ired. Eq. 470, that the marriage of an idiot is void, and gave a sentence of nullity. The principle is equally applicable to the marriage of a lunatic; and we should consider that case a conclusive authority in this, had the question been then argued. Indeed, we then considered the point as one so little open at this day, that we only referred to the passage in Blackstone and the single adjudication of Sir William Scott, in support of the opinion. We have, therefore, heard the argument of the question in the present case, and, after doing so, our reflections only confirm our first opinion. In *Browning v. Reane*, 2 Phill. 69, Sir John Nichol said: "The want of reason must invalidate a contract, and the most important contract of life, the very essence of which is consent." It is not material, whether the want of consent arises from idiocy or lunacy, or both combined; for, if the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her person and property, such a one can not dispose of his or her person or property by the matrimonial contract, any more than by any other contract. The case of *Turner v. Meyers* was one of lunacy, brought by the husband after his recovery. Sir William Scott cited three cases: that of *Morrison*, before the delegates, in 1745, which is quoted by Blackstone as his authority;

that of *Parker v. Parker*, before the consistory court of London, in 1757, and since reported in 2 Lee, 382; and *Cloudesley v. Evans*, in the same court, in 1763; as having fully determined, that marriage, like other civil contracts, is invalidated by want of consent of capable persons. He said, that in those cases all the old *dicta* were brought before the courts; and he took it to be as clear a principle of law at that day (1808) as any could be, and as incapable of being affected by any general *dicta*, which may be found in writers of earlier periods, as any fundamental maxim, on which the courts are in the habit of proceeding; and he pronounced the marriage null.

A like sentence was given by Sir John Nichol in *Lord Portsmouth's Case*; the husband being of weak mind, and the weakness being to such a degree, that the party was pronounced not of sound mind sufficient to enter into that contract. And in the same case the opinion of the chancellor was given, as it has often been in other cases, in support of the principle, by directing the committee to prosecute proceedings for declaring the marriage void on the ground of the lunacy: *In re the Earl of Portsmouth*, August 23, 1824; Shelford on Lunatics, 449. In the case of *Parker v. Parker*, the question was entertained, after the death of one of the parties, upon an application for administration. Sir George Lee did not hesitate to go into the inquiry of fact; clearly intending, if he found the lunacy, to pronounce the marriage null, and refuse administration to the widow. But he found capacity and pronounced for the widow's interest; but the case of *Browning v. Reane*, 2 Phill. 69, is a similar one, in which Sir John Nichol found the lunacy, and, after making the observations before quoted, he pronounced against the marriage and refused the administration.

But it was argued that these adjudications grew out of the act of 15 Geo. II., c. 30. But that is impossible. The act is not alluded to in them. Moreover, it has no application to the cases. It does not enact that the marriage of lunatics shall be void. It assumes that they are; and to prevent mischief from an uncertainty as to the capacity of one who has been of unsound mind, ascertained judicially by inquisition, it enacts that the marriage of such a person shall be void, though of sound mind at the time, unless he or she may have been so declared by the chancellor and the commission superseded.

Again it was said, that these are the adjudications of the ecclesiastical courts, and are founded, not on the common law, but on the canon and civil laws, and therefore not entitled to re-

spect here. But it is an entire mistake to say, that the canon and civil laws, as administered in the ecclesiastical courts of England, are not parts of the common law. Judge Blackstone, following Lord Hale, classes them among the unwritten laws of England and as parts of the common law, which, by custom, are adopted and used in peculiar jurisdictions: 1 Bl. Com. 79; Hale's Hist. Com. L. 27, 32. They were brought here by our ancestors as parts of the common law, and have been adopted and used here in all cases to which they were applicable, and whenever there has been a tribunal exercising a jurisdiction to call for their use. They govern testamentary causes and matrimonial causes. Probate and reprobate of wills stand upon the same grounds here as in England, unless so far as statutes may have altered it: *Dickenson v. Stewart*, 1 Murph. 99; *Ward v. Vickers*, 2 Hayw. (N. C.) 164; *Redmond v. Collins*, 4 Dev. 430 [27 Am. Dec. 208].

Divorce causes fall within the same category, upon the conferring of the jurisdiction; which must be emphatically true upon the enactment, that the court should not only grant divorces for certain specified causes, but "for any other just cause," thus giving no guide to our discretion but the lights to be derived from our ancestors in the like cases. We remark, in conclusion, that in not one of the cases cited did the judge profess to found his sentence of nullity on the civil and canon laws, as distinct from the common law, or that the principle was peculiar to that part of the common law which owed its origin to those laws. On the contrary, the reasoning throughout is, that marriage is not, as was once supposed, an exception, by force of the canon law, to the principle of the common law, which makes contracts invalid for the want of mental capacity. It is the common law itself, which authorizes and requires the modern decisions of the courts, in opposition to some of the *dicta* of elder text-writers. In that light is the subject viewed by Chancellor Kent in the case of *Wightman v. Wightman*, decided in 1820, 4 Johns. Ch. 343. So we also considered it in *Johnson v. Kincade*, 2 Ired. Eq. 470; and we have no doubt, that, by the common law of England, as held in that country for a century, as we know, and probably much longer, and not denied by any adjudication by any court, as far as can be traced for four or five centuries, a marriage of a lunatic is void, and must be so pronounced by every court, to which, and in every form in which, the subject can be presented. And, besides, a statute gives the general jurisdiction here, and, acting under it, we can

not hesitate to say, that it is against reason, that one without reason should be held to have made a binding contract.

But it was further said at the bar, that there was evidence, from which lucid intervals, for at least short periods since the marriage, might be inferred, and that amounts to confirmation. A writer upon the law of marriage lays it down, that when a marriage is void *ipso facto*, acquiescence, long cohabitation and issue, or the desire of the parties to adhere, can not amend the original defect: Paynter on Marriage and Divorce, 157. In a case of alleged insanity at the time of the marriage, subsequent acquiescence, during long or frequent periods of undoubtedly restored reason, would be cogent proof of competent understanding at the time of the marriage; but, assuming lunacy then to have existed, the rule of the author quoted seems to be sustained by the consideration, that marriage is a peculiar contract, to be celebrated with prescribed ceremonies, and, therefore, subsequent acts, not amounting in themselves to a marriage, will not make that good which was bad in the beginning. But we do not propose to lay down such a rule in this case; for we are clearly of opinion, that, at no time since this marriage, has this person been so in possession of her faculties, as to be capable of judging of her rights or interests, or of making or confirming a contract.

The court was next asked to refuse to annul the marriage as a matter of discretion, as being best for all parties, under existing circumstances. If the court could treat it as a case of discretion, the present is, certainly, not one for the exercise of the discretion by leaving this person and her property in the power of the defendant, whose motives and conduct from the beginning to the end have been most flagitious. But we have no such discretion as will enable us, on the hearing of the cause, to refuse the decree, if the party can legally demand it. The committee usually apply to the chancellor for directions upon this, as upon other subjects involving the expenditure of the lunatic's estate, and after an inquiry whether it is proper any steps should be taken to avoid the marriage of one found to be a lunatic, it is ordered accordingly. Before the master or before the chancellor, objection will be heard on this proceeding from any person in interest; and one may be heard on a motion to discharge the order or supersede the commission. The question would thus be made distinctly and decided on the proper evidence and facts. But when the cause has been regularly instituted, the court can not refuse to entertain it. On the hearing,

the decree must be granted, if the pleadings and proofs authorize it; and the court can not allow, in this stage of the cause, the merits to be embarrassed by having other questions complicated with them: *Parnell v. Parnell*, 2 Phill. 158.

Lastly, objection was taken to the form in which this suit was brought, being in the name of the supposed lunatic by her committee; whereas, it is said, it should be in the name of the committee alone. The authority for the position is a passage in a treatise on the law of *non compotes*, by Mr. Stock, p. 20; for which is cited *Lord Portsmouth's Case*, 1 Hag. Ecc. 356. We do not doubt that a suit for nullity may in England be brought by the committee in his own name alone; for, in the ecclesiastical courts any party in interest, though a third person, as a committee of a lunatic, or one claiming an estate in remainder after failure of issue, may institute such a suit or may intervene in it, as Mr. Chitty states: 2 Gen. Prac. 460. It may be noticed in passing that he adds, that in general there should, for greater security, whilst the parties and witnesses are living, be a sentence in the ecclesiastical courts, though the marriage be absolutely void, as in the case of lunacy. But to the point under consideration; it appears that, from the nature of the jurisdiction of the ecclesiastical courts, which is *in rem* or on the status of the person, the committee alone may institute proceedings to annul the marriage of the lunatic. That, we think, is all that is meant, when it is said the committee is a proper party; for it is certain he also often joins the lunatic with himself. That was done in the very case cited by Mr. Stock, as is seen in a report of it in an earlier stage: *Lord Portsmouth's Case*, 3 Add. Ecc. 63. It there appears to be "a cause of nullity of marriage promoted and brought by John Charles, Earl of Portsmouth, acting by Mr. Fellows, his committee." But, if it were otherwise in the ecclesiastical courts, it would yet be a proper mode of proceeding in a court of equity here; which may well follow either its own course or that of the ecclesiastical courts in this respect. The usual course in a court of equity, after an inquisition and appointment of a committee, is by bill by the committee, joining the lunatic; and although the object of the suit was to avoid the lunatic's own act, it was held that the joinder was no cause of demurrer, even though then the maxim was, that no person could stultify himself; for the joinder was considered a mere formality: *Ridler v. Ridler*, 1 Eq. Cas. Abr. 279; *Brown v. Clark*, 3 Wood. Lec. 378, note; Stock on Non Compotes, 34. In this state we have said it was good either way: *Shaw v. Bur-*

ney, 1 Ired. Eq. 148. In *Johnson v. Kincade*, the bill was in the form of the present, and we decreed on it. Indeed, we most approve of it, because upon suspending the commission, *pendente lite*, for the restoration of the party's reason, the case would be proceeded in without the necessity of a supplemental bill by the lunatic to procure the benefit of the proceedings as far as they had gone.

The court, therefore, pronounces the marriage null; and, after what has been said, of course, with costs against the defendant.

Decree. Letitia M. A. Crump, acting by her committee, William R. D. Lindsay, against Henry Morgan.

March 2, 1844. This cause coming on to be heard upon the bill, answer, exhibits, and proofs, and being debated by counsel on each side, and the whole matter being considered by the court: It is thereupon declared by the court, that in the month of October, in the year 1839, in the county of Montgomery, the ceremony of a marriage between the plaintiff, Letitia M. A. Crump, and the defendant, Henry Morgan, was had and solemnized by and before a justice of the peace for the said county: and that the said plaintiff had been, in July, 1838, duly found to be a lunatic and incapable of managing her affairs, and so to have been continually from April, in the year 1837, and had been duly committed as a lunatic, to the care and guardianship of her brother, the said William R. D. Lindsay, as her committee: and also, that at the time of the fact of the said marriage thus had and performed, the said plaintiff Letitia M. A. was still under the care and custody of her said committee as a lunatic, and was, in fact, then and there a lunatic and person of unsound mind, and incapable, from mental imbecility, of understanding and consenting to any contract, and especially a contract of so high a nature as that of the said marriage: and that the said Henry well knew of such unsoundness of mind of the said plaintiff, and by fraud and imposition, without the knowledge of the said committee, or any friend of the said plaintiff, clandestinely, and for the mere purpose of wicked gain, did procure the said marriage in fact to be had and celebrated: and the court doth further declare that the said plaintiff hath, ever since the said marriage in fact, continued to be, and is now, lunatic and of unsound mind, and incapable of consenting to the said marriage, and thereby confirming the same, even if such subsequent consent could, in law, confirm and make valid the said marriage. Therefore, the court doth pronounce and declare the said pretended marriage *de facto*, contracted and celebrated between

the said Letitia M. A. Crump and Henry Morgan, to have been and to be utterly null and of no effect; and that the said Letitia was, and is, and of right ought to be, free and at liberty from any bond of said pretended marriage *de facto*; and doth pronounce that she ought to be divorced, and doth decree that she, the said Letitia M. A. Crump, be freed and divorced from the said Henry. And the court further decrees that the said defendant pay all the costs of this suit, to be taxed by the proper officers.

INSANITY OF ONE OF PARTIES MAKES MARRIAGE VOID: *Jenkins v. Jenkins*, 26 Am. Dec. 437; note to *Jackson v. King*, 15 Id. 368; *Johnson v. Kincade*, 2 Ired. Eq. 470. In the last case the plaintiff, Reese Johnson, had been deranged from his infancy. On his arrival at the age of twenty-one, an inquisition was held, and it was found that he was "of unsound mind, and that he had been so from his infancy," and witnesses gave it as their opinion that he had been an idiot from his birth. While he was in this condition, Ann Kincade, by confederation with her friends, procured Johnson to go from the country to Salisbury, and there a license was procured and they were married. There had been no previous courtship or acquaintance between them. A suit was brought by his guardian to have the marriage annulled, and while the suit was pending, a second inquest was held, and it found him "to be an idiot, and that he was so from his birth." The court declared the marriage null, and, in the course of the opinion, said: "It can not be doubted, that idiocy or lunacy is an insuperable impediment to the contracting of marriage, as it is to the entering into any other contract. Whatever doubt may in a dark age have been dropped by writers on the law, the intelligent commentators of modern times, and most able judges, unite in holding that a competent share of reason is necessary to the validity of the matrimonial contract; for that it, as every other, depends on the consent of the parties, and, without understanding, consent can not be given." The principal case was approved in *Cooke v. Cooke*, Phill. L. 588; and was referred to approvingly in *Koonce v. Wallace*, 7 Jones' L. 198, though the court said that the opinion in the principal case "on the question whether if she [the plaintiff] had been restored to sound mind, the marriage was such an one as would have been confirmed by her subsequent assent and cohabitation, was extrajudicial."

WINBORN v. GORRELL.

[8 IREDELL'S EQUITY, 117.]

ESTATE IS SECURITY FOR PURCHASE MONEY to be paid until an actual conveyance.

APPOINTMENT OF OBLIGOR IN BOND AS GUARDIAN of the infants to whom it has been conveyed by the obligee, does not extinguish the debt.

DECREE IS NOT BINDING ON THOSE NOT PARTIES.

DECREE IN EQUITY IS NOT A LEGAL TITLE, when it requires a person to convey the title by executing a deed; and until such conveyance the title remains in the persons against whom the decree is rendered.

INDEMNITY.—Where a party obtaining such a decree conveys the land covered thereby in trust for his creditors, the creditors get only an equity that is subject to prior equities against the assignor.

WILLIAM HANNER entered into an agreement with his father-in-law, Armfield, to purchase the land in question, and gave two bonds therefor, payable at different dates, for one thousand dollars and five hundred dollars respectively. The father-in-law, on his death-bed, surrendered up to William Hanner, as a gift, the smaller bond, and also gave Hanner's infant children, his grandchildren, the other bond, by way of advancement. Having died intestate, Hanner administered on his estate, and was appointed guardian of the grandchildren, and obtained possession of the bond for one thousand dollars. He then filed a bill against the heirs at law of Armfield, set forth these facts, and insisted that, by law, the bond was extinguished by his appointment as guardian and administrator, and praying that they might be compelled to specifically perform the contract and convey the land to him. There being no appearance for the heirs, the bill was taken *pro confesso*; the cause was heard *ex parte*, and a decree entered, without requiring the payment of purchase money, that the heirs should convey the land in fee to W. Hanner. Nothing was done under this decree. W. Hanner subsequently assigned all his property to Gorley, in trust, for the benefit of his creditors, and included this piece of land in the assignment, described as the land "which the said Hanner claims under a title bond executed by the said Armfield to him, and under a decree of the court of equity for Guilford county." The present bill alleging these facts was filed by the children of W. Hanner and Winborn, the surety on the guardianship bond, against Gorrell, the trustee, and the creditors, who claim the property under the assignment. The answer admits these facts, but the defendants insist that the plaintiffs have an adequate remedy against Winborn, as surety; and allege that they had no knowledge of plaintiff's claim; that they believed W. Hanner owned the land; and that their claims will be lost if the plaintiff is allowed to prevail. By consent, the cause was removed from the court of equity of Guilford county to the supreme court.

Graham, for the plaintiff.

Morehead, *contra*.

By Court, RUFFIN, C. J. If the bill were against William Hanner alone, even these defendants would not, at least they do not, question the proposition, that the land would be a security for the debt due on the bond given to his children by their grandfather. By the express terms of the sale, the purchase

money was to be paid before Hanner was to have a deed. He did not even pretend in his bill, that Armfield meant to discharge him from that provision of the contract, when he gave one of the bonds to him and assigned the other to his children. If there had been such an understanding or intention on the part of Armfield, why did he not convey the land at the same time? The only answer must be, that it was well understood, that the legal title was still withheld, as a security for the provision the grandfather was making in his last illness for his grandsons. So Hanner's own bill treated the transaction; for it admits, that he was bound to pay the whole purchase money before he could call for a conveyance, and puts his right to call for it in that suit upon the position, that he had paid it—not in fact, but upon a legal principle, by way of extinguishment by means of his being the guardian of the infant proprietors of the bond, and thus being the hand to pay and receive. Therefore, unless that principle were applicable to the case, it stood upon the common doctrine of the court of equity, that, until an actual conveyance, the estate is a security for the purchase money analogous to a mortgage: *Oliver v. Dix*, 1 Dev. & B. Eq. 605; *Green v. Crockett*, 2 Id. 390. Now it was an entire mistake to suppose that the principle of law relied on had anything to do with the case. The action at law on the bond was not even suspended; for, although the debtor was the guardian, yet the action on his bond would not be in his name, but in that of the infants themselves, the assignees of the bond, by a next friend. But even if it were suspended, it would only be during the guardianship; and that being the act of the guardian himself, and the law, and not of the infant creditor, the suspension would not work an extinguishment, but be only temporary and cease with the guardianship, as in the case of the debtor administering on the creditor's estate: *Nedham's Case*, 8 Rep. 136. But certainly, however it might be at law, a court of equity would never enforce against any person, and much less against infants, any such principle of extinguishment, but would relieve against it, and keep on foot every security necessary to the satisfaction of the debt, against any act of the debtor himself.

It may be true, that the wards might charge their father on his bond for the purchase money, and also might charge him and his surety on the guardian bond; but that does not preclude them from insisting also on their real security. Indeed it is just and proper, they should have recourse to that in the

first instance, as the property of the debtor himself, in exoneration of his surety: *Bunting v. Ricks*, 2 Dev. & B. Eq. 130 [32 Am. Dec. 699]. There was then no satisfaction of the debt in question, as is obvious on Hanner's own bill; and, consequently, he had no right to a conveyance, and upon the bill of his children against him the land would be declared a security for the debt, and disposed of accordingly.

The decree in that cause made no difference. The present plaintiffs were, none of them, parties in that suit, and, therefore, not bound by the decree *proprio vigore*. If a conveyance had been actually made under it, the plaintiffs would still have been entitled to relief against Hanner himself, because obtained in bad faith towards those creditors, and with the view to defeat them of a security to which they were entitled. But there has been nothing done under the decree, and, therefore, the legal title is still outstanding in the heirs of Armfield, and the plaintiffs may insist upon it as a security for their debt, actually subsisting. The decree of a court of equity is not a legal title. It professes only to require the person to convey the title by executing a deed: *Ferebee v. Procter*, 2 Dev. & B. 439. And this brings up for consideration the defense set up by the trustee and creditors claiming under Hanner's assignment, as peculiar to themselves, and founded on merits independent of those of Hanner and himself. They claim to be just creditors, who have honestly obtained a security for their debts without a knowledge of the plaintiff's equity; and, therefore, entitled to hold it. But they were mistaken in supposing that they had obtained a conveyance of this land as a security. They say, they relied on the decree as determining the rights of the parties and constituting a title. But we have seen, that is not so. The deed is only an assignment of an equitable title, and then, were these persons purchasers instead of creditors, the estate itself must answer all claims to which it would have been subject in the hands of the assignor. It is only the purchaser of the legal title without notice of a prior equity, who can hold against such equity: *Polk v. Gallant*, 2 Dev. & B. Eq. 395 [34 Am. Dec. 410]. In the case before us, there is not only not a conveyance of the legal title, but there is a plain reference on the face of the deed to the decree and covenant as constituting the only title of Hanner, and those documents would have enabled all these persons to have discovered the true state of the case, not to speak of the actual knowledge of the trustee and the active creditor in getting the deed. But it is useless to consider the particular cir-

cumstances, as the defendants are but the assignees of an equity, and get only what the assignor had; which was the right to have this land, when he had paid to his three children the debt he owed them for the residue of the purchase money. The court takes nothing from the defendants, which they or Hanner ever had; but only say, the defendants can not take from the plaintiffs a security which they honestly had before the defendants got theirs, and which they have done nothing to impair. Therefore, the land must be declared to be a security for the sum due on the bond for one thousand dollars, and it must be referred to inquire what that sum is; and, as both sides wish the land sold, when the debt shall be ascertained, a sale will be decreed, and, after paying the plaintiff's debt and interest, and the costs, the balance will go to the trustee to be applied under his assignment.

Decree accordingly.

VENDOR HAS A LIEN ON REAL ESTATE for the purchase money: *Lagow v. Badollet*, 12 Am. Dec. 258; *Tiernan v. Beam*, 15 Id. 557; *Lupton v. Marie*, 21 Id. 256; *Clarke v. Curtis*, 37 Id. 625.

JOINT DEBTOR AS CREDITOR'S EXECUTOR.—Where the obligee in a joint and several bond appoints as his executor one of the obligors, or one of the administrators of such obligor, having assets, the debt is discharged as to all, although the obligee in his life-time may have obtained several judgments against the deceased obligor's representatives and the survivor: *Griffith v. Chew*, 11 Am. Dec. 556. See also *Bigelow v. Bigelow*, 19 Id. 591; *King v. Green*, Id. 46.

ASSIGNEE TAKES SUBJECT TO EQUITABLE CLAIMS: *Matter of Howe*, 19 Am. Dec. 395; *Van Epps v. Van Deusen*, 25 Id. 516. The principal case was referred to approvingly in *Harris v. Harrison*, 78 N. C. 214; was cited to the point that an assignor can not give to his assignee a right for more than he could himself recover, in *Long v. Barnett*, 3 Ired. Eq. 636; and regarded as authority for the proposition that a purchaser takes subject to all prior equities, in *Smith v. Brittain*, 3 Id. 355.

JUDGMENT AGAINST A PARTY WHO HAS NO NOTICE of the proceeding is void: *Shaefer v. Gates*, 33 Am. Dec. 164.

CASES
IN THE
SUPREME COURT
OF
OHIO.

WYMAN *v.* HURLBURT.

[12 OHIO, 81.]

PROPERTY FOUND TO BE DERELICT, IN A STRICT MARITIME SENSE, does not imply that the owner is divested of all right in such property.

ABANDONMENT OF PROPERTY DIVESTS THE OWNER of his title therein, and the finder who reduces the same to possession after such abandonment, is not guilty of conversion.

TROVER. The opinion states the case.

Giddings, Chaffee, Wade, Hurlburt, and Hitchcock, for the plaintiff.

Wade and Ranney, for the defendants.

By Court, WOOD, J. This case was submitted to the jury at the August term of the supreme court, 1842, in Ashtabula county. The action was trover, brought to recover of the defendants eight hundred and sixty-five dollars in money, lost on board the schooner Willis, which foundered in Lake Erie, in the fall of 1835, and was found in the summer of 1836, by the defendants, within the limits of Ashtabula county, who raised the schooner, and converted the money to their own use. The jury returned a special verdict, and judgment must now be entered, either for the plaintiff or defendant, according to the law of the case, as it shall be found to arise in favor of one or the other of the parties. The finding of the jury is in these words:

. "1. That the plaintiff was the owner of the money mentioned in the plaintiff's declaration, on the twenty-seventh day of Sep-

tember, 1836, amounting to the sum of eight hundred and sixty-five dollars, and that the same, and the interest thereon from the day and year last aforesaid, amounts to the sum of one thousand one hundred and seventy-two dollars and seven cents.

"2. That the said defendants converted the money to their own use, before the commencement of this suit.

"3. That the said money was found on board the schooner G. S. Willis, and that the said plaintiff, on the said twenty-seventh day of September, 1836, was the owner of said schooner, and that the same was lost by stress of weather, on the waters of Lake Erie, in the month of November, 1835, and was found by the defendants, in August, of the year 1836, wrecked in sixty feet of water, etc., six miles from the south shore of the lake, and that the same was seized by the defendants, on the day and year first aforesaid, and the said money found in the schooner, by the said defendants, and that, at the time the said schooner was seized by the defendants, the same was abandoned by the plaintiff; and that said schooner was, on the day and year aforesaid, derelict property, and when found in the bottom of the lake was worth nothing.

"4. That a reasonable compensation to the said defendants, for raising the said schooner, and her cargo, amounts to the sum of two thousand four hundred dollars and forty-two cents.

"5. That the value of the said schooner, and her cargo, including said money, at the time said defendants raised her, and after the same was brought into port, was one thousand eight hundred and sixty-five dollars; and if, on the facts aforesaid, the court should be of opinion that the plaintiff ought to recover, then the jury, aforesaid, find the defendants guilty of trover and conversion, as they are charged in the declaration, and assess the damages at the sum of one thousand one hundred and seventy-two dollars and seven cents; but if the court shall be of opinion that the plaintiff is not entitled to recover, then the jury, aforesaid, find for the defendants," etc.

On this special verdict the counsel for the plaintiff present three distinct points for the consideration of the court: 1. That the schooner, and the money in question, were not properly derelict at sea, and, therefore, the defendants are not entitled to the rights and privileges of maritime salvors. 2. That the defendants converted the money in dispute to their own use, and have, therefore, forfeited all right to salvage for the same, though they might, originally, have been entitled thereto. 3. That, if the defendants are considered as salvors, and enti-

tled to salvage, they are not entitled to the whole, but can, at most, retain only a moiety; and, as the defendants have both the money and the schooner, the plaintiff has the right to recover for the money.

The counsel for the plaintiff also contend, that, to entitle themselves to compensation, the defendants were bound to proceed under the statute of Ohio, "securing to the owners boats, and other water craft, found going adrift." These positions are all urged with ability, and evince no small industry and research; and, under other aspects, than those presented by the special verdict, would call upon us to decide, whether our great inland seas, which are above the ebb and flow of the tide, are subject to the jurisdiction of courts of admiralty? Whether a conversion of the thing would defeat the maritime lien, and if not, the rule of compensation by way of salvage; or, perhaps, whether the statute in question had any application? It appears to us, however, that neither of these questions necessarily arises on this special verdict.

It is found, by the jury, that when the vessel was raised, and the money in question converted by the defendants, the vessel and money were derelict property, and abandoned by the owner. Perhaps, if the term derelict only were used by the jury, there would be more difficulty in the case; for if used in its strict maritime sense, it would not imply that the owner was divested of all right in the property: 7 Am. Jur. 30, 32. But when the jury find the vessel and money were, also, abandoned by the owner, we suppose they intend to be understood that all hope, expectation, and intention to recover the property were utterly and entirely relinquished; and such the judges, who tried the cause, believe was the evidence given on the trial; and, in case of property, thus derelict and abandoned, either on the high seas or anywhere else, it belongs to the first finder who reduces it to possession. The verdict, therefore, satisfies us that when this conversion occurred, the plaintiff was divested of all ownership in the money, and has no right to recover.

On the face of this special verdict, however, there is a most gross inconsistency, which requires to be mentioned. It is not noticed by counsel, as it is known to be an error, and doubtless had its origin in mistake. It finds, that when the property was taken by the defendants, on the twenty-seventh of September, 1836, it was the property and money of the plaintiff; and then finds it was, at the same time, when converted by the defendants, derelict and abandoned; in other words, that the plaintiff

had then no property in the money. From the recollection of those who tried the cause, and from the fact that this circumstance is not noticed by counsel, it is evidently an error. The intention was to find, that when the property was lost, it was the property of the plaintiff, and not after it was derelict and abandoned; and the verdict has, therefore, been considered as so finding the fact.

Judgment for defendants.

LANE, J., dissented.

ABANDONMENT IN GENERAL.—Abandonment may be defined to be the actual leaving of property, with the intention of relinquishing all claim or right thereto. To constitute an abandonment, therefore, there must be the concurrence of the intention to abandon, and the actual relinquishment of the property, so that it may be appropriated by the next comer: *Judson v. Malloy*, 40 Cal. 299. The important fact to be determined in each case as it arises, and the one upon which most of the reported adjudications have turned, is, what was the intention of the party whose rights are alleged to be abandoned? This is a question of fact, the determination of which is for the jury: *Waring v. Crow*, 11 Id. 369; *Keene v. Cannovan*, 21 Id. 293; *St. John v. Kidd*, 26 Id. 272; *Davis v. Perley*, 30 Id. 630; *Roberts v. Unger*, Id. 676; *Moon v. Rollins*, 36 Id. 333; *Bell v. Bed Rock etc. Co.*, Id. 214; *Smith v. Cushing*, 41 Id. 97; *Myers v. Spooner*, 55 Id. 257; *Wiggins v. McCleary*, 49 N. Y. 346; *Chuggage v. Duncan*, 1 Serg. & R. 110; *McGoan v. Ankeny*, 11 Ill. 558; *Heath v. Biddle*, 9 Pa. St. 273; *Landes v. Perkins*, 14 Mo. 238; *Weill v. Lucerne Min. Co.*, 11 Nev. 200; *Oreamamo v. Uncle Sam etc. Co.*, 1 Id. 215. Although doubtless the occasion may sometimes arise, when the facts which constitute the evidence of abandonment are so clear and uncontradicted, as to justify the court in instructing the jury, as a matter of law, that there has been an abandonment: *Sample v. Robb*, 16 Pa. St. 305; *Atchison v. McCulloch*, 5 Watts, 13.

To warrant the finding of abandonment, each case must depend mainly upon its own peculiar circumstances, the evidence of which must be full and clear: *Banks v. Banks*, 77 N. C. 186; *McDonald v. Bear River etc. Co.*, 13 Cal. 220; *Masson v. Anderson*, 59 Tenn. 290. Mere non-user and lapse of time, unaccompanied with any other evidence showing intention, has been generally held not enough to constitute abandonment: *Mallett v. Uncle Sam etc. Co.*, 1 Nev. 188; *Seaman v. Vawdrey*, 16 Ves. 390; *Noble v. Sylvester*, 42 Vt. 146; *Moon v. Rollins*, 36 Cal. 333; *Lawrence v. Fulton*, 19 Id. 684. Such facts are, however, competent evidence of intention, and if the non-user is long continued, especially where no intention is expressed, the jury may sometimes infer an intention to abandon: *Keene v. Cannovan*, 21 Cal. 293; *Overry v. Breedlove*, 12 La. Ann. 745. In this latter case, property sunk in a steamboat, and unclaimed for twenty-three years, was conclusively presumed to be abandoned. And see, to the same effect, *United States v. Smiley*, 6 Saw. 640. So, also, failure to pay taxes is not sufficient evidence: *Mayor v. Riddle*, 25 Pa. St. 259; *Keene v. Cannovan*, 21 Cal. 291; *Davis v. Perley*, 30 Id. 630; nor is the removal of an inclosure from about a lot to which title is claimed by possession: *Sweetland v. Hill*, 9 Id. 556; or standing by when a sale of property in which an interest is claimed, is made without objecting thereto: *Marquart v. Bradford*, 43 Id. 526. To constitute an abandonment, the acts of

the party must be done voluntarily, and with the consciousness of the ownership of the thing abandoned: *Landes v. Perkins*, 14 Mo. 238; *Morenhaut v. Wilson*, 52 Cal. 263. It can not be made to a particular person, or for a consideration, and therefore an attempted sale which is invalid for any reason, can not be considered as an abandonment: *McLaren v. Benton*, 43 Id. 467. But see *contr* *Barkley v. Tieleke*, 2 Mont. 59, where an attempt to convey a water right by an invalid deed was held an abandonment. If the actual leaving of property with the intention not to return is shown, the abandonment is as complete, no matter how short a time it may last, whether for a minute or a second, as though it had continued for years: *Waring v. Crow*, 11 Cal. 367. By so abandoning, the property becomes to the former owner as though he never had any right or interest in it. This result may follow from a single act or a series of acts, but after it has once occurred, the prior owner can not come in within the time allowed for commencing civil actions, and reassert his rights of ownership, to the prejudice of those who may have in the mean time appropriated it: *Davis v. Butler*, 6 Id. 510; *McGoon v. Anteny*, 11 Ill. 558; *Eastman v. Harrie*, 4 La. Ann. 193. Nor can the state, under the act of congress of March 3, 1825, against plundering or stealing from wrecked or stranded vessels, sustain a conviction, when the property taken has been abandoned. Such property is open to the acquisition of any one who has the energy and enterprise to seek its recovery: *United States v. Smiley*, 6 Saw. 640.

In an action to recover the possession of real or personal property, where the defense relied on is the prior abandonment of the plaintiff, evidence of the same may be given without a special plea thereof, under a denial of the plaintiff's title: *Willson v. Cleveland*, 30 Cal. 192; *Bell v. Bed Rock etc. Co.*, 36 Id. 214; *Morenhaut v. Wilson*, 52 Id. 263; and if a denial of such title is set up in the answer, together with the facts constituting the abandonment, it is error for the court to compel the defendant to elect upon which of such defenses he will proceed to trial: *Bell v. Brown*, 22 Id. 671. But to avail himself of a plaintiff's abandonment, the defendant must show that it occurred prior to suit being brought, for otherwise it will be unavailing: *Pralus v. G. & S. M. Co.*, 35 Id. 30. To rebut the conclusion of abandonment, any evidence showing a contrary intention may be introduced, as, for example, the fact of bringing a suit against third parties for the property claimed to have been abandoned: *Richardson v. McNulty*, 24 Id. 329; or making improvements on the same: *Bliss v. Ellsworth*, 36 Id. 310; as well as the declarations of the party himself: *McMillan v. Warner*, 38 Tex. 410; *Myers v. Spooner*, 55 Cal. 357. But evidence of the general belief of the community is not admissible: *Phenix etc. Co. v. Lawrence*, Id. 143; nor is that of the party taking possession after the alleged abandonment: *Stone v. Geyser Q. M. Co.*, 52 Id. 315.

OF MINING CLAIMS.—The application of the settled doctrines of abandonment to conflicting mining claims, which depend for their validity upon occupancy and prior appropriation, is of comparatively recent origin, and well illustrates the adaptability of the rules of the common law to changed conditions of facts, and the various exigencies of society. The rights of miners upon the public domain, whose sole right to the claims which they worked depended upon location and prior possession, in accordance with local rules and regulations which they established among themselves, were recognized and enforced by the courts at an early day after the discovery of gold in California. As all such rights depended upon possession, it was soon established that they might be lost by abandonment. As was well said by

the court, in discussing this subject in *Richardson v. McNulty*, 24 Cal. 339: "The mining ground in controversy, before it was occupied by the plaintiff, so far as the right to mine the same by parties without title is concerned (and this is true of all the public mineral land of the state), was *publici juris*, and open to the appropriation of any one desiring it. By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continued his until he manifested his intention to part with it in some manner known to the law. He may sell it, or give it to another, or transfer it in any other mode authorized by law (thereby preserving the continuity of possession), or he may abandon it. In doing the latter, he must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or re-claim it for himself in any event, and regardless and indifferent as to what may become of it in the future. When this is done, a vacancy in the possession is created, and the land reverts to its former condition, and becomes once more *publici juris*, and then, and not till then, an abandonment has taken place. There can be no abandonment except where the right abates and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy, still exists, although vested in another, and the continuity of possession remains unbroken."

In addition to the ordinary rules of law determining the question of abandonment, the local customs and regulations of miners and the various statutes founded thereon have provided that a certain amount of work shall be done upon each claim yearly, the failure to perform which has repeatedly been held to constitute an abandonment: *Depuy v. Williams*, 26 Cal. 310; *St. John v. Kidd*, Id. 263; *Strang v. Ryan*, 46 Id. 33. And if such claim were originally located by several as tenants in common, and after such abandonment a relocation is made by part of the first locators, along with others who are strangers to the first location, the tenants in common whose names are omitted in the notice of relocation, cease to have any interest in the mine: *Strang v. Ryan*, *supra*. But a relocation, made by the original locators and others, is not necessarily an abandonment of the original location: *Weill v. Lucerne M. Co.*, 11 Nev. 200. It seems, however, that the intention of abandonment, presumed from the failure to perform the requisite work, may be overcome by proof that such omission was involuntary, as, for example, where the failure was caused by the hostility of Indians, who rendered working on the mine dangerous to life, even though the original locator did not return to resume work until a second location had been made by another party: *Morenhaut v. Wilson*, 52 Cal. 263. And even where there are no regulations or laws requiring a certain amount of work to be done each year, leaving a mine, removing tools, and following mining in a foreign country for several years, will be sufficient to raise a presumption of abandonment: *Seymour v. Wood*, 53 Id. 303. And the same conclusive presumption will be raised as to mining tailings, which are suffered to flow wheresoever they list, without endeavoring to confine them within their proper limit: *Jones v. Jackson*, 9 Id. 237.

OF EASEMENTS AND OTHER INTERESTS IN LAND.—It may be laid down as a general proposition that the legal title to land, founded upon a grant, or prescription for such a length of time as to warrant the presumption of a grant, can not be lost by mere abandonment, nor by any mere parol disclaimer, and the reason assigned for such rule is, that to hold otherwise would be contrary to the statute of frauds: *Davenport v. Turpin*, 43 Cal. 597; *Per-*

ris v. Coover, 10 Id. 631; *Smyles v. Hastings*, 22 N. Y. 217; *Wiggins v. McCleary*, 49 Id. 346; *School District v. Benson*, 31 Me. 381; *Brown v. Cockerell*, 33 Ala. 46; *Tolman v. Sparhawk*, 5 Metc. 476; *Mayor v. Riddle*, 25 Pa. St. 259. Mr. Washburn in his treatise on real property, vol. 2, page 457, after a careful analysis of the cases which, upon a casual inspection, might seem to sustain a contrary doctrine, thus sums up the rule: "It is probably, therefore, not too strong a conclusion to assert, that in no case can a man lose his title to a freehold in land by any act or oral declaration of abandonment, unless it comes within the category of estoppel, or is followed by such a possession by the person claiming title thereto in his stead, as brings the case within the statute of limitations." Where, however, the right is merely incipient, and depends upon occupancy and continued possession, as a right depending upon a location and survey, the rule is equally well settled, that the same may be lost by abandonment: *Dikes v. Miller*, 24 Tex. 417; *Jones v. Merrimack etc. Co.*, 31 N. H. 381; *Ferris v. Coover*, 10 Cal. 631; *Bequette v. Caulfield*, 4 Id. 278; *Gluckauf v. Reed*, 22 Id. 469. In determining whether such a result follows, the intention of the prior owner, to be gathered from all the facts of the case, governs and controls. Such intention can not be presumed from a failure to cultivate, inclose, improve, or put into actual use, town lots purchased at auction: *Smith v. Cushing*, 41 Cal. 97; *Judson v. Malloy*, 40 Id. 299; or from temporarily removing from land until proper accommodation for the owner's family could be obtained: *Heath v. Biddle*, 9 Pa. St. 273; *McLaughlin v. Maybury*, 4 Yeates, 534; or in the case of a homestead, from the fact that the husband and wife were anxious to sell the same, and made repeated efforts so to do, but failed, because a satisfactory price could not be obtained: *Dunn v. Tozer*, 10 Cal. 167.

Whether non-user of an easement, unaccompanied by other acts inconsistent with the exercise of such rights, will be sufficient to warrant the presumption of an abandonment, is determined largely by the fact of how the easement originated, whether by express grant, or by prescription. It is said that in the former case no presumption of abandonment arises from non-user, no matter how long the same may be continued, if the owner of the servient estate does no act interfering with its use: *Jewett v. Jewett*, 16 Barb. 150; *Hall v. Caughey*, 15 Pa. St. 43; *Elliott v. Rhett*, 5 Rich. 406; *Bannon v. McAngier*, 2 Allen, 128; *White v. Crawford*, 10 Mass. 183; *Smyles v. Hastings*, 22 N. Y. 217; *Wiggins v. McCleary*, 49 Id. 346; *Castle v. Shipman*, 35 Id. 533; *Arnold v. Stevens*, 24 Pick. 106; *Jennison v. Walker*, 11 Gray, 426; *Cook v. Major*, L. R., 6 Eq. 177; *Wash. on Easements*, 551. If, on the other hand, the easement was acquired by prescription, non-user for the length of time required for its establishment will raise a presumption of abandonment. Such presumption is merely *prima facie*, however, and may be rebutted by evidence showing a contrary intention: *Wright v. Freeman*, 5 Har. & J. 477; *Ward v. Ward*, 7 Exch. 838; *Yeakle v. Nace*, 2 Whart. 123; *Pratt v. Sweetser*, 68 Me. 344; 2 Wash. Real Prop. 56; 3 Kent's Com. 448. Mr. Holmes, however, in his edition of Kent's Com., in a note on page 449, vol. 3, repudiates this distinction drawn between the mode in which the easement was acquired, and lays down the broad doctrine that mere non-user is never presumptive evidence of an abandonment. But no matter how the easement was acquired, non-user for a less time than that required by the statute of limitations for the perfection of the easement, is no presumption of an abandonment: *Carlisle v. Cooper*, 4 C. E. Green, 261; *Williams v. Nelson*, 23 Pick. 141; *White v. Crawford*, 10 Mass. 183; *Emerson v. Wiley*, 10 Pick. 310; *Corning v. Gould*, 16 Wend. 531; *Outberth v. Lawton*, 3 McCord, 194; *Parkins v. Dunham*, 3 Strobb. 224. When, however, the non-

user is accompanied by acts on the part either of the owner of the dominant or servient tenement, which manifest an intention to abandon, and which either destroy the object for which the easement was created, or the means of its enjoyment, an abandonment will take place: *Davis v. Gale*, 32 Cal. 27; *Canny v. Andrews*, 123 Mass. 155; *Ward v. Ward*, 7 Exch. 838; *Regina v. Thorley*, 12 Q. B. 515; *Hale v. Oldroyd*, 14 M. & W. 789; *Williams v. Nelson*, 23 Pick. 141; *Dyer v. Depui*, 5 Whart. 584; *Mowry v. Sheldon*, 2 R. I. 369; *Crain v. Fox*, 16 Barb. 184. Thus where a city, for the purpose of widening a street, purchased a piece of land, with a building thereon, which had by prescription an easement in a chimney standing on an adjoining lot, took down the building, appropriated the greater part of the land to widening the street, and allowed the remainder to be vacant for six years, and then conveyed it, it was held that the easement had been abandoned: *Canny v. Andrews*, 123 Mass. 155. So also suffering a dam and mill which had been washed away to remain in such condition for twenty years, will constitute an abandonment of the mill privilege: *Liggins v. Inge*, 7 Bing. 682; *French v. Baintree Mfg. Co.*, 23 Pick. 216; *Hatch v. Dwight*, 17 Mass. 289; *Taylor v. Hampton*, 4 McCord, 96. And where water has been appropriated for a particular purpose, and that purpose has been accomplished, a presumption of abandonment will arise from non-user and the fact that the water right was sold for a merely nominal sum: *Davis v. Gale*, 32 Cal. 27. But simply turning water from an artificial ditch into a natural watercourse, and mingling it with the natural waters of the stream, for the purpose of conducting it to another place for use, does not show an abandonment: *Butte Canal etc. Co. v. Vaughn*, 11 Id. 143; *Hoffman v. Stone*, 7 Id. 47.

OF PROPERTY IN WILD ANIMALS.—Property in wild animals can be acquired by occupancy only. To constitute such occupancy it is sufficient if the animal be deprived of his natural liberty, by wounding it, or otherwise, so that it is brought within the power of the hunter. If after such wounding the hunter relinquishes the chase he will be presumed to have abandoned his property in the animal: *Pierson v. Post*, 3 Cal. 175; *Buster v. Newbirk*, 20 Johns. 75. But where wild animals, after they have been reduced to possession and domesticated, stray away by accident, there is no abandonment: *Amory v. Flynn*, 10 Id. 102; *People v. Kaatz*, 3 Park. Crim. 129.

OF PATENT RIGHTS.—Acquiescence by a patentee in the public use of his invention, and especially if such acquiescence is accompanied by actual encouragement, is sufficient to constitute an abandonment of such invention: *Wilson v. Rousseau*, 4 How. 646; *American Leather Co. v. American Tool Co.*, 4 Fish. 284; *Dudley v. Mayhew*, 3 N. Y. 9; *Wyeth v. Stone*, 1 Story, 273; *Fruit Jar Co. v. Wright*, 12 Blatchf. 149; *Gray v. James*, Pet. C. C. 394; *Ransom v. New York*, 1 Fish. 252; *Teese v. Phelps*, 1 McCa. 48; *Bell v. Daniel*, 1 Fish. 372; *Earl v. Page*, 6 N. H. 477; *Pennock v. Dialogue*, 2 Pet. 1. Such acquiescence will not be presumed, however, in the absence of all knowledge of the use: *Shaw v. Cooper*, 7 Id. 292. And in an action for an infringement, when the defense relied upon is the abandonment of the invention, such abandonment must be shown clearly and satisfactorily, and beyond a reasonable doubt, because it is held the law does not favor an abandonment: *Woodbury etc. Co. v. Keith*, 101 U. S. 479; *Seymour v. McCormick*, 2 Blatchf. 240; *Pitts v. Hall*, Id. 229; *Wyeth v. Stone*, 1 Story, 273. Upon filing an application in the patent office, notice is given to the public that the inventor has no intention to abandon his invention. If, however, gross delay subsequently occur in the prosecution of such application, so that laches will be imputed to the applicant, it will be presumed that such invention was abandoned. Thus, where

an application for a patent was withdrawn, and no further steps to secure the same were taken for ten years, it was held to have been abandoned: *Bevin v. East Hampton Bell Co.*, 9 Blatchf. 50. And see to the same effect *Marsh v. Commissioner*, 3 Biss. 321. Where, however, such delay in the prosecution of the application for a patent is the result of the officials in the patent office, no abandonment will be inferred: *Sayles v. R. R. Co.*, 1 Biss. 468; *Ryan v. Goodwin*, 3 Sumn. 514; *Root v. Ball*, 4 McLean, 177; *McMillan v. Barclay*, 4 Brews. 275.

IN INSURANCE: See the note to *Bosley v. Chesapeake Ins. Co.*, 22 Am. Dec. 349.

LEWIS v. BANK OF KENTUCKY.

[12 OHIO, 132.]

FOREIGN BANKING CORPORATION, Suing under the statutes of this STATE, need not allege their corporate existence, and may maintain a joint action against the drawer and indorser of a bill of exchange.

OBJECTION TO THE LEGAL EXISTENCE OF PLAINTIFF must be raised below; it can not first be taken advantage of on appeal.

PLEA OF NON ASSUMPSIT PUTS IN ISSUE the plaintiff's capacity to sue.

COURTS WILL TAKE JUDICIAL NOTICE OF THE EXISTENCE OF CORPORATIONS formed under the laws of their own state, but not of foreign corporations.

COSTS OF PROTEST MAY BE PROPERLY ALLOWED in the statutory action for money had and received on a bill of exchange, without an averment of protest.

NOTARIAL CERTIFICATE OF PROTEST IS EVIDENCE of the costs thereof.

ASSUMPSIT for money had and received, on a bill of exchange drawn by Henry Lewis, for three thousand dollars, indorsed by Samuel Lewis. Due notice of demand and non-payment were admitted. Upon the evidence of the notary's certificate of protest, upon which two charges of three dollars and fifty cents each were indorsed, the court gave judgment for the plaintiff for three thousand three hundred and fifty-seven dollars and fifty cents. The further facts appear in the opinion.

Chase and Ball, for the plaintiff in error.

Storer and Gwynne, for the defendants in error.

By Court, BIRCHARD, J. Several errors are assigned in this record: First. That the declaration is insufficient.

The declaration is the common count, authorized by the act to regulate judicial proceedings where banks and bankers are parties: Swan's Stat. 149, sec. 9; and it contains no averment that the plaintiffs were a body corporate. It is urged that the omission of this averment is fatal. If it shall be found that such averment is necessary, the conclusion would follow, inas-

much as the defect would go to the very title of the plaintiff. In suits brought by corporations created by the laws of this state, this general form of pleading has always been held sufficient. Is it not equally so in the case of suits by foreign corporations? Upon principles of comity, such corporations have always been allowed to sue in this and other states of the union. In many of the states, if not in all, it has been held sufficient to declare in the corporate name, without setting forth the act itself: *Bank of United States v. Haskins*, 1 Johns. Cas. 132.

In the case of the *Bank of Michigan v. Williams*, 5 Wend. 482, the court say: "A corporation, when it sues, need not set forth its title in the declaration, but it must show, by evidence upon the trial, that it is a body politic, having legal authority to make the contract which it seeks to enforce." So in the case of *Jackson v. Plumb*, 8 Johns. 378, and in *Dutchess Cotton Manufactory v. Davis*, 14 Id. 238 [7 Am. Dec. 459], it is held that, where a corporation sues, they need not set forth, by averment in the declaration, how they were incorporated; but, upon the general issue pleaded, they must prove that they are a corporation. To this point the authorities are numerous.

The next question upon the pleadings is, whether foreign banks, suing in this state, can avail themselves of the act regulating proceedings where banks and bankers are parties, so as to maintain a joint action against a drawer and indorser. The mode of prosecuting suits within the courts of this state, is under the control of the legislature. What rules they may see proper to make, must be guides as well to foreign as to domestic corporations. One object of the statute was, to prevent multiplicity of suits, and the consequent oppressive costs of litigation. The case of *Fullerton v. The Bank of the United States*, 1 Pet. 614, is in point, and sustains this declaration. The reason of the law is alike applicable to foreign and domestic banks, and there is no occasion to restrain the natural import of its words. Nor has the objection, as to the want of an averment, that the plaintiff is a bank, any greater force; for, while it should, undoubtedly, appear that the plaintiff comes within the qualification of the statute, in order to take advantage of its provisions, we are of opinion that it is sufficiently apparent, upon the face of this declaration, that the suit is brought by a bank. A formal averment of that fact, in the body of the declaration, would therefore be superfluous.

Another error assigned is, that proof was not made of the plaintiff below being incorporated. The absence of this proof

does not distinctly appear upon the bill of exceptions, and it is only made out by inference. But it is well remembered, by the judges who sat upon the trial, that no such question was then made. The case was tried and conducted throughout, as if that fact were admitted. If the party intended to avail himself of any such defect of proof, the objection should have been made at the time, or, at least, some notice given of it in the bill of exceptions. In the case of *Perkins v. Dibble*, 10 Ohio, 433 [86 Am. Dec. 97], it was held, that an objection, not taken on the circuit, will not be considered in bank. The court there say: "The objection would have been fatal if taken at the time of trial on the circuit. If, however, it had then been made, no doubt the defect of testimony would have been supplied:" *Id.* 437. In almost every trial, there are facts necessary to make out the case, which, by the parties, are treated as admitted, without requiring formal proof. To make the absence of express proof, in such cases, ground for error, after verdict and judgment, would be unfair, and attended with great inconvenience. The rule adopted in the case of *Perkins v. Dibble*, is salutary, and we feel no disposition to depart from it.

But, it is claimed for the defendant in error, upon the authority of a circuit decision, reported in 5 Ohio, 283, that a plea of the general issue admits the corporate capacity of the plaintiff, and that where a defendant intends to object the want of capacity to sue, he should have pleaded that matter specially, in abatement or in bar. As the question is one of importance in pleading and practice, it may be well to consider it. The case cited is that of the *Methodist Episcopal Church v. Wood*, 5 Ohio, 283, and the authorities relied upon for the doctrine there laid down, are *Conard v. Atlantic Ins. Co.*, 1 Pet. 386; S. C., *Id.* 450; *Society for the Propagation of the Gospel v. Pawlet*, 4 Id. 480; *Mayor of Stafford v. Bolton*, 1 Bos. & P. 40; *Kennebec v. Call*, 1 Mass. 483, 484; *Mellor v. Spateman*, 1 Saund. 340, n. 2.

The case of the *Methodist Episcopal Church v. Wood*, was that of a corporation created by a law of this state, of which the court were bound to take judicial notice. The question was not whether they had a charter, and were acting in a corporate capacity, but whether they had, in all things, complied with this act of incorporation. In the case of *Conard v. The Atlantic Ins. Co.*, 1 Pet. 450, which was an action of trespass, the court held that no evidence of corporate capacity was required on a plea to the merits, upon the ground that the plea necessarily admitted that capacity, and that the objection could

only be made on a plea in abatement. But, it is worthy of remark, that no such position seems to have been taken by counsel, and no authority to sustain the doctrine is cited; and the court proceed to say that, independent of that ground, the agreement upon which the trial was had, as well as the admission of the bond, "was certainly *prima facie* evidence of an admission of the corporate capacity of the plaintiff, and sufficient to throw the burden of proof upon the other side." The case of the *Society for the Propagation of the Gospel v. Town of Pawlet and Orlas Clarke*, 4 Id. 480, 510, which was an action of ejectment, is similar to the preceding, save that the point was argued; for Justice Story remarks, that the evidence of corporate capacity is sufficient; and the certificate to the circuit court was, that the plaintiffs have shown that they have a right to sue. The case of *The Proprietors of Kennebec v. Call*, 1 Mass. 482, holds that a private act must be proved, and that the court would not take judicial notice of it. This was upon the general issue, in an action of trespass, and was not applicable to the case under consideration. For the plea of *non assumpsit* is much broader than that of not guilty in trespass, where many defenses are inadmissible under the general issue. And, in the subsequent case of *Portsmouth Livery Company v. Watson*, 10 Mass. 92, it was held, that foreign corporations are to be proved; and satisfactory proof will be required as of any other fact, material in issue to the country; though of the state corporations the court are judicially informed.

The case of *Mayor of Stafford v. Bolton*, 1 Bos. & Pul. 40, was an action on the case for tolls, in which the plea was "not guilty," and proof of corporate existence was made; but there being a misnomer, it was held that advantage could be taken of it only by plea in abatement. The principle there decided, and that contained in the note to 2 Saund. 240, is nothing more than that a misnomer of a corporate plaintiff, like that of a natural person, is not to be taken advantage of on plea to the merits. We should feel at liberty, therefore, notwithstanding what is said in the case of *The Methodist Episcopal Church v. Wood*, to adopt, upon this question, such rule as would best accord with general principles, and the analogies of the law. Now, what does the plea of *non assumpsit* admit? Nothing. It denies the whole cause of action, and right to recover. It neither admits the making of the contract, nor the capacity of either party to contract. It denies the contract, *in toto*. It puts the plaintiff upon proof of a right to recover, and he must

prove a full right. What the plaintiff is bound to prove, the defendant may disprove. He may show that no cause of action ever existed, by any proof tending to establish that fact. Corporations are creatures of the statute. They are artificial beings, having no natural powers, nor any existence independent of the charter creating them. So that one mode of maintaining the issue of *non assumpsit*, where the plaintiff claims to be a body corporate, is to show that no such artificial being ever existed; for, a nonentity can not contract, nor be contracted with. So far, then, as reason and principle go, it would seem that the plea of *non assumpsit* does put in issue the capacity to sue, where the plaintiff claims to be a body corporate. And that, by no rule of logic can it be said that a plea, which is a denial *in toto*, admits, either in whole or in part, what it expressly denies.

This doctrine, moreover, is well established by authority, as in the cases of the *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238 [7 Am. Dec. 459]; *Portsmouth Livery Company v. Watson*, 10 Mass. 92; *Bank of Michigan v. Williams*, 5 Wend. 432; *Hargrave v. The Bank of Illinois*, Breese, 122; *Bank of Auburn v. Weed*, 19 Johns. 300; *Farmers and Mechanics' Bank v. Rayner*, 2 Hall, 195; *Jackson v. Plumbe*, 8 Johns. 378, where the earliest authorities are cited, viz.: *Roll v. Osborn*, Hob. 21; *Henrique v. Dutch West India Co.*, 2 Ld. Raym. 1535; 1 Kyd on Corp. 292, 293; *Peters v. Mills*, Bull. N. P. 107. Upon the whole, we think the true rule is that settled in Massachusetts and New York, and recognized in other states, that in suits brought by corporations of our own state the court will take judicial notice of their capacity to sue, while those claiming to be foreign corporations must prove their corporate character under the general issue.

As an additional reason for this distinction, the courts of this state are not presumed to be acquainted with foreign charters. They have not the means of information as to their nature and extent; and this remark is equally applicable to the people of the state. While, on the other hand, the corporators have full knowledge of, and the means to establish, their capacity and powers. The issue for them is affirmative, and when they would come into court the *onus probandi* should be theirs.

A third error assigned is, that the finding includes damages at six per cent., and seven dollars, the costs of protest. The costs of protest were properly allowed if the proof was sufficient. The bills were duly protested. The notarial certificate

was sufficient evidence of the protest, and the fact of protest was, to say the least, some evidence that legal costs were made in protesting for non-acceptance and for non-payment, because these acts are never performed gratuitously. We have no doubt but that we should have refused a new trial, if a jury had allowed such charges on even so slight evidence as this. When substantial justice has been done by a verdict, a court should not disturb it, although found upon slight evidence. And when, by consent of parties, a court is substituted for a jury, and, in like manner, finds the facts of the case, a revisory court ought to treat their finding with equal respect. The error, if there be any, is in a matter of fact, and not of law.

The same may be said of the objection, that the computation is too large by two dollars; that it should have been three thousand three hundred and fifty-five dollars and fifty cents, instead of three thousand three hundred and fifty-seven dollars and fifty cents. Were this true, it would be a small matter. But the bill of exceptions does not very clearly show that the error exists. The presumption arising from the fact that the computation was made subject to the inspection of the counsel of both parties, is that the judgment was taken for the right sum, and the difference is too trifling to justify the four members of this court in going into a minute calculation, with a view to fix the amount to a fraction.

The last and remaining point is as to the right of the defendant to protest damages. Upon this we are not embarrassed with difficulty. The form of pleading is permitted by the statute, and is sufficient, by virtue of its provisions. The proof, to entitle the party to such damages in suits of this description, is the same as is required in those cases where the statutes have not dispensed with specific allegations in pleadings. The law makes the common count sufficient for the bank. Its policy would be defeated, were we to hold it sufficient for one purpose only. True, it is, that the damages now given on protested bills, are those prescribed by the act of 1831; yet this act only limits to six per centum, damages which were allowed at a higher rate under the act of 1810, and which were recoverable in this form when the act of 1824 took effect.

Judgment affirmed.

SUIT BY A CORPORATION IN FOREIGN STATE: See *Williamson v. Smoot*, 12 Am. Dec. 494, and note; *Lathrop v. Commercial Bank*, 33 Id. 481.

ALLEGATION OF CORPORATE EXISTENCE, WHEN ESSENTIAL: See note to *Harris v. Muskingum Mfg. Co.*, 29 Am. Dec. 375, where this subject is con-

sidered at length. Also, *Richardson v. St. Joseph Iron Co.*, 33 Id. 460; *Welland Canal Co. v. Hathaway*, 24 Id. 51, and note, citing prior cases in this series.

JUDICIAL NOTICE WILL BE TAKEN OF CORPORATION created under private statute: *Commercial Bank v. Newport Mfg. Co.*, 35 Am. Dec. 171. *Contra, Haven v. N. H. Asylum*, 38 Id. 512.

CORPORATION IS NOT REQUIRED TO PROVE ITS EXISTENCE under the general issue: *Prince v. Commercial Bank of Columbus*, 34 Am. Dec. 773; *Penobscot Boom Corp. v. Lamson*, 33 Id. 656; *Phoenix Bank v. Curtis*, 36 Id. 462. But see *contra, Bank of Utica v. Smalley*, 14 Id. 526; *Vernon Society v. Hills*, 16 Id. 429; *Welland Canal Co. v. Hathaway*, 24 Id. 51.

THE PRINCIPAL CASE IS CITED in *Smith v. Weed Sewing Machine Co.*, 26 Ohio St. 565, to the effect that courts will take judicial notice of the existence of domestic corporations, but that in suits by foreign corporations the general issue puts in issue the plaintiff's capacity to sue.

BANK OF GALLIPOLIS v. DOMIGAN.

[12 OHIO, 220.]

RETURN OF A SHERIFF, SHOWING DUE EXECUTION of a *fi. fa.*, can not be disputed on a motion to amerce such officer. The faithful discharge of the sheriff's obligations can only be inquired into in an action for a false return.

STATUTE OF 1824, REQUIRING A SHERIFF TO RECEIVE the notes of a bank in satisfaction of a judgment in favor of such bank, is constitutional.

MOTION to amerce the defendant, as sheriff, for receiving the notes of plaintiff in satisfaction of a judgment recovered by plaintiff, suing on a promissory note, not negotiable, for the use of one Valette. The further facts appear in the opinion.

P. B. Wilcox and G. Swan, for the plaintiff in error.

Swayne, Bates, and J. W. Andrews, for the defendant.

By Court, WOOD, J. We entertain the opinion, that the great portion of the evidence which was given on the trial of this motion in the court of common pleas should be laid out of view. It appears to us immaterial, whether, in the language of counsel, the proof shows that the defendants have tampered with the sheriff, or, whether he has trifled with the process of the court, so far as the present case is concerned.

The important inquiry is, what is the return of the sheriff on the *fi. fa.*? And does it show the due execution and faithful discharge of his official obligations, cast upon him by the reception of the execution? If the return of the officer shows this, upon its face, the plaintiff could not go behind it, on a motion to amerce; but is left to his remedy by action for a false

return. The reason is, this summary mode of redress is not given, by statute, for a false return. The statute is penal, must be construed strictly, and the sheriff shown to be within both the letter and spirit: *Bushnell v. Eaton*, Wright, 720. Taking the facts, then, to be true, as set forth in the return, is the sheriff justifiable in receiving the amount of damages due the plaintiff in the paper of the bank? Several statutes are cited by counsel, as bearing on this question. The ninth section of the act of 1824, "to regulate proceedings where banks and bankers are parties," among other things, provides, that, in all suits or actions prosecuted by a bank or banker, or persons claiming as their assignees, etc., and for their benefit, the sheriff, upon any execution in his hands, in favor of such bank or banker, their or his assignees, etc., shall receive the note or notes of such bank or banker from the defendant, in discharge of the judgment, and that, if such notes are refused to be received from the sheriff, he shall not be liable to any proceedings whatever, at the suit, or upon the complaint, of such bank or banker, or his or their assignee: Swan's Stat. 147.

The act of 1842, Ohio L., vol. 40, p. 33, declares the meaning and intention of the act of 1824, sec. 9, was, and is, that payment may be made by the debtor of such bank, etc., in the notes or obligations thereof, issued as currency, etc., as against the assignees, whether such bank retains an interest therein or not, but provides the act shall not extend to any assignee who, heretofore, shall have become such, *bona fide*, in the settlement of his claims against such bank or banker. These enactments have been thought severe and unjust, by some, but we must suppose them to be such, as were believed to be called for by the circumstances of the times. At all events, their constitutionality can not be seriously questioned, for they affect only the remedy, which is always subject to the legislative will, and in refusing to permit proceedings to be instituted against the sheriff they do not impair the validity of the contract.

Is the return of the sheriff, then, in compliance with this law? In substance, it recites, that he has made the amount of the costs, seventy-three dollars and fifty-nine cents, and the said Valette, not being an assignee, *bona fide*, of the promissory note on which the judgment was rendered, in the settlement of any claim or claims of his against said bank, he had received the balance of the judgment, four thousand two hundred and fifty dollars, in the notes of the bank. Here was the case, where the sheriff was bound to act. He must do so at his

peril. Neither mistakes of law nor of fact excuse him. If he refused the notes, and made his levy, he was liable to the defendants, if Valette were not such *bona fide* assignee; if he received them, he was liable to Valette, if he sustains the character and relation to the bank he assumed. The sheriff, then, was bound, for himself, to decide the question. He has done so, and set it out in his return; and the remedy against the sheriff, if any exist, must be, in our view of the case, by an action for a false return.

Judgment affirmed.

SHERIFF'S RETURN TO A *SCIRE FACIAS* CAN NOT BE CONTROVERTED: *Blythe v. Richards*, 13 Am. Dec. 672.

THE PRINCIPAL CASE IS CITED IN *Moore v. McOuef*, 16 Ohio St. 53, to the effect that a party who seeks to avail himself of the remedy by amercement, must bring himself within both the letter and spirit of the statute.

ADAMS' LESSEE v. JEFFRIES.

[12 OHIO, 253.]

PROCEEDINGS OF COURTS OF GENERAL JURISDICTION are presumed to be regular and within the scope of their authority.

COURT HAS NO JURISDICTION TO HEAR AND DETERMINE an application for the sale of an intestate's real estate, when the heir is not a party to such proceeding, and an order of sale made under such circumstances is void.

EJECTMENT upon an agreed statement of facts. Plaintiff claimed title to the premises in dispute by virtue of an administrator's sale under order of the court, in the estate of one Faulkner. To support his title he offered in evidence the order of sale, and proceedings under the same, which were rejected by the court. No proof of petition for sale, service of process, or other proceedings, prior to the order, were made or offered. Defendant had judgment, and plaintiff moves for a new trial.

T. Ewing and H. Stanbery, for the plaintiff.

James R. Stanbery, for the defendant.

By Court, LANE, C. J. The validity of transfers of land, by virtue of legal proceedings, are frequent subjects of examination in courts of justice. The governing principle in these cases, is, that whoever assumes to exercise powers conferred by law, must first show jurisdiction over the subject. The judicial proceedings of courts of general jurisdiction, exercising the ordinary powers of chancery or of common law, are presumed to be regu-

lar, and such courts are presumed to act within the scope of their authority. Every intendment will be made to support their powers. Yet, even in the proceedings of these courts, if they transcend the limits which the law prescribes, and assume to act where they have no jurisdiction, their acts are utterly void: *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]; *Mills v. Martin*, 19 Id. 33; *Latham v. Edgerton*, 9 Cow. 227; *Snyder v. Snyder*, 6 Binn. 483 [6 Am. Dec. 493]; *Sumner v. Parker*, 7 Mass. 79; *Smith v. Rice*, 11 Id. 507.

I do not here inquire whether the mere omission of showing jurisdiction on the record invalidates their acts, or whether such judgments, although void when viewed as the foundation of rights, may not have some efficacy when used defensively, as ground of protection; but it may well be doubted whether it is not necessary to impeach them by positive proof of a want of authority: *Tucker v. Oxley*, 5 Cranch, 34; *Ex parte Tobias Watkins*, 3 Pet. 193, 202; *Voorhees et al. v. Jackson*, 10 Id. 449; *Wood v. Mann*, 1 Sumn. 578; *McCormick v. Sullivan*, 10 Wheat. 192. But how far such judgments are void or voidable, and whether there exists any difference between the law and the chancery rules of our courts, on these points, are matters which may be settled when cases shall arise that demand it. Neither is it necessary that I should do more than allude to proceedings *in rem*. Of this class are proceedings among heirs for partition: *Glover's Heirs v. Ruffin*, 6 Ohio, 255; *Pillsbury v. Dugan's Administrator*, 9 Id. 117 [34 Am. Dec. 427].

Proceedings by guardians to sell the land of their wards: *Stall v. MacAlester*, 9 Ohio, 19. And proceedings by administrators before 1824 to sell decedents' lands: *Ewing's Lessee v. Higby*, 7 Id. 201 [28 Am. Dec. 258].

These have properly no parties; the possession of the object is sufficient notice to all who have rights to assert them. The authority of the courts depends upon having the subject of their action within their control. The legislature may require or dispense with notice; but the acts of courts are valid, when they have established their jurisdiction over the thing.

Where the law confers upon courts an authority, not after the course of the common law, over property, whose owners are required to be before them as adversaries, they act as tribunals of special and limited jurisdiction: *Bend v. Susquehanna Bridge and Bank Co.*, 6 Har. & J. 130 [14 Am. Dec. 261]; *Thatcher v. Powell*, 6 Wheat. 119; *Denning v. Corwin et al.*, 11 Wend. 647; *Smith v. Fowle et al.*, 12 Id. 9. It is necessary that such tri-

bunals show they act within the scope of their powers. But after jurisdiction is once acquired, however irregular or erroneous their proceedings may be, they can not be collaterally impeached; and they conclude all persons, unless annulled by *certiorari* or appeal. A vast body of authorities, bearing on this point, may be found collected in 3 Cow. & H. Notes to Ph. Ev. 803; *Ludlow's Heirs v. Johnson et al.*, 3 Ohio, 553 [17 Am. Dec. 609]; *Atkinson v. Jordan*, 5 Id. 294 [24 Am. Dec. 281]; *Glover's Heirs v. Ruffin*, 6 Id. 255; *Pillsbury v. Dugan's Administrator*, 9 Id. 117 [34 Am. Dec. 427]; *Stall v. MacAlester*, Id. 18; *Thompson v. Tblmie*, 2 Pet. 164; *Voorhees et al. v. Jackson*, 10 Id. 449. All these cases, however, assume that the jurisdiction of the court is first established; and no attempts are made to sustain their proceedings by intendment or presumption until after this essential prerequisite. Those judges who have been most ingenious in surmounting the irregularities of such tribunals, have been careful to show how the jurisdiction was not contested.

In *Voorhees et al. v. Jackson*, 10 Pet. 449, the judge, while obviating objections to irregularities, is careful to say they do not apply "to the jurisdiction of the court over the case, to the cause of action, or to the property attached." So Duncan, J., in 11 Serg. & R. observes, that "the purchasers need not look to matters previous to the decree, except to the jurisdiction and the parties." And the reports of our own state carefully notice in this class of cases, that the jurisdiction has first attached: *Glover's Heirs v. Ruffin*, 6 Ohio, 255; *Pillsbury v. Dugan's Administrator*, 9 Id. 117 [34 Am. Dec. 427]. But this want of jurisdiction may always be shown, as it renders the act done void or unavailable for every purpose: *Slocum v. Wheeler*, 1 Conn. 429; *Mills v. Martin*, 10 Johns. 83; *Hyde v. Stone*, 9 Cow. 230 [18 Am. Dec. 501].

The case of *Weyer v. Zane*, 3 Ohio, 306, deserves a passing notice in this connection. The report assumes that a judgment without process is not void, and that the proceedings of a competent and authorized court can not be so irregular as to be a nullity. We find no fault with the judgment; it was in strict accordance with law. The practice act of 1813, 2 Chase's Stat. 795, sec. 8, provided that the sheriff might take a "judgment bond" from a defendant to whom he had returned goods, after levy; and when amerced for not making money, he might have judgment on the bond, at the same term, without further process. The proceeding in that case was under this statute; and the reporter, without adverting to these provisions, has

sought to justify a sound judgment by stretching good principles too far. Applying our doctrines to the case before us, we find that the common pleas, exercising the powers of a court of probate, possessed the jurisdiction of ordering the sale of the decedent's estate, upon a petition by the administrator against the heir. The jurisdiction did not vest unless the land belonged to the decedent: *Griffith v. Frasier*, 8 Cranch, 9, 24; *Moore v. Tinner's Administrator*, 5 Mon. 46 [17 Am. Dec. 35]. Nor unless process was served upon the heirs: *Messinger v. Kinter*, 4 Binn. 97; *Smith v. Rice*, 11 Mass. 507, 513; *Proctor v. Newhall*, 17 Id. 81, 91; *In the matter of Hemiup*, 2 Paige, 320; S. C., 3 Id. 310; *Hallett v. Hare*, 5 Id. 316.

The heir has a right to be a party to the proceedings which deprive him of his estate; and we are constrained to deny the jurisdiction of a court which attempts to proceed without him. It will be seen that this opinion affects no proceedings except those since 1824.

Motion overruled.

After the foregoing opinion was pronounced, a motion was made for a new trial, on the ground of newly discovered evidence, which, upon special circumstances in this case, affecting subsequent purchasers, was sustained, and a new trial ordered.

HEIRS ARE NECESSARY PARTIES TO THE PROCEEDINGS FOR A SALE of a decedent's estate: *Lockwood v. Stradley*, 12 Am. Dec. 97.

THE PRINCIPAL CASE is an important adjudication in the state in which it arose, and the consideration of the same has often come before the courts. It is cited as authority in *Bell v. Ohio Life etc. Co.*, 1 Biss. 269, and *Smith v. Pratt*, 13 Ohio, 550, to the point that the proceedings of courts acting without jurisdiction of the person and subject-matter are wholly void; in *Harbeck v. Toledo*, 11 Ohio St. 224, to the point that the regularity of the proceedings of courts of inferior jurisdiction must affirmatively appear on the record; in *Sheldon v. Newton*, 3 Id. 499, to the point that jurisdiction can not be made to depend upon the record disclosing such a state of facts to have been given in evidence, as to warrant the exercise of its authority. In *Sprague v. Leth-erberry*, 4 McLean, 444, and *Reynolds v. Stansbury*, 20 Ohio, 357, the proposition that the court, under the statute of 1831, had no jurisdiction to hear and determine an application for the sale of a decedent's estate, unless the heir was made a party to such proceeding, was affirmed. In the subsequent case of *Moore v. Starks*, 1 Ohio St. 375, Thurman, J., dissented from this doctrine, holding that it was unsupported by either the previous or subsequent decisions, and originally promulgated upon a wrong interpretation of the statute; and this view was adopted by the court in *Benson v. Cilley*, 8 Id. 616.

CLARK v. STATE.

[12 Ohio, 483.]

MEDICAL EXPERT HAVING TESTIFIED IN GENERAL TO HIS BELIEF in a prisoner's insanity, may be asked, on cross-examination, whether he believed that the prisoner was able to distinguish right from wrong, and that it was wrong to commit murder, arson, rape, or burglary.

NON-EXPERTS MAY TESTIFY AS TO THEIR OPINIONS OF A PRISONER'S INSANITY, while both they and experts should state the facts upon which such opinions are based.

OBJECTIONS TO THE ADMISSIBILITY OF EVIDENCE, not made on the trial, will not be considered on appeal.

MEDICAL TESTIMONY SHOULD BE GIVEN WITH GREAT CARE and received with the utmost caution, and unless sustained by reasons drawn from facts, is entitled to little weight.

MURDER. On the trial one Thompson, a physician, having testified to his belief in the prisoner's insanity, was asked on cross-examination, whether, from what he knew of the prisoner, he is or was incapable of distinguishing right from wrong, and whether he knew it was wrong to commit murder, arson, rape, or burglary. Nine unprofessional witnesses were permitted to testify, from what they knew of the prisoner, as to their opinion of his mental condition. The defendant objected to the admission of this testimony on the ground of its irrelevancy, but was overruled by the court. The defendant was convicted of murder in the first degree.

G. Swan and John W. Andrews, for the defendant.

Swayne and Heyl, for the state.

By Court, BIRCHARD, J. As to the questions put to Robert Thompson, and his answers, little need be said. The questions were proper for the purpose of testing the value and extent of the opinion given by him, on his examination in chief. No better illustration of the propriety of the question could be given than was furnished by the examination of this witness, who stated that he saw nothing like frenzy or raving madness, and that he had detected nothing of what, technically speaking, is comprised in the expressive term "delusion." He thought, perhaps, Clark was deluded on the subject of his name, as he insisted it was William Y. Graham, and not William Clark; also, in reference to a water pump which he professed to have invented. But other proof established the fact that he had been engaged in an effort to improve a water pump, and that his true name was William Y. Graham; but, admitting the delusion as to these two subjects, there was not the slightest evidence to connect it

with the act of taking the life of Cyrus Sells. The defendant sought to make out a case of general insanity, or, if the proof would better sustain it, of partial insanity. The defense looked to whatever form of insanity might prove most available, when all the evidence should be before the jury.

Viewing the case, and the state of facts existing at the time the questions were put to Doctor Thompson, and it would seem that each one of the questions and answers was relevant to the issue tendered by the defendant, for each one tended to some extent to show that the state of general insanity relied on by him did not exist. Upon the other point presented by the bill of exceptions there is more difficulty. To determine what the rule is, and should be, it will be useful to look to adjudications upon analogous questions, and to the subject-matter of the inquiry, and to the reason of the rule itself. The bill of exceptions shows the true character of the objection taken to the testimony of Domigan, and the nine other non-professional witnesses, to be this, that they could give no opinion as to the insanity of the accused, under any circumstances. It was not that they did not detail the facts upon which they had formed the opinion stated by them. Although such an objection is argued, it does not belong to the case, and will not be considered on error. It was required of the witnesses to state the facts upon which they based their opinions, unless considered as waived by counsel, in order to abridge the time occupied by the trial. The rule in *Dickinson v. Barber*, 9 Mass. 227 [6 Am. Dec. 58], was adhered to: "That the opinion of physicians, as to a party's insanity, was not to be received as evidence, unless predicated upon facts, testified to, either by them or others." It is the same as in *Hathorn v. King*, 8 Id. 371 [5 Am. Dec. 106], where it was held "that physicians, in giving an opinion as to insanity, must state the circumstances or symptoms from which they drew their conclusions."

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Throughout the whole trial, and as often as the question was raised, or objection made, this was the ruling of the court, for, upon the facts almost, if not entirely, depended the value of every opinion, whether professional or non-professional. Hence the bill of exceptions states the one and only ground of objection to have been, that non-professional witnesses were allowed to give their opinion as to the feigned or real character of the pretended insanity of the defendant, based upon the facts which they knew, and had witnessed, and were upon the stand, ready to relate.

In examining this question, it should be remembered that "insanity is a disease of the mind, which assumes as many and various forms as there are shades of difference in the human character." It exists in all imaginable varieties, and in such a manner as to render futile any attempt to give a classification of its numerous grades and degrees that would be of much service, or, under any circumstances, safe to be relied upon in judicial investigations. It is an undoubted fact, that, in determining a question of lunacy, the common sense of mankind must ultimately be relied on, and, in the decision, much assistance can not be derived from metaphysical speculations, although a general knowledge of the faculties of the human mind, and their mode of operations, will be of great service in leading to correct conclusions: Shelford on Lunacy, 38.

The verdict of a jury, on a question of insanity, is but the opinion of non-professional men, formed upon facts and science disclosed and learned at the trial. They have facts and opinions to consider and weigh. The credibility of all witnesses is not the same. The value of all their opinions is not the same. It would be but a farce to try such a question upon the strength of medical opinions, and to regard the weight of evidence always on the side which produced the greatest numbers. Sir John Nicholl, in *Evans v. Knight*, 1 Add. 239, observes that "experience in the ecclesiastical court taught him that evidence on questions of capacity, being commonly that of opinion, merely, was almost always contradictory; that perhaps no two will have seen the party at the same time, and under the same circumstances; and that each measures by his own standard."

The difficulties witnessed by Sir J. Nicholl almost always occur when the opinions of physicians are required in cases of medical jurisprudence. Whenever they have enlisted on the side of either party, or of some favorite theory, and one portion of the profession is placed in array against another, the difficulties mentioned in the passage above quoted are greatly multiplied, and, however honest or renowned for professional character the witnesses may be, such will be the conflict of their testimony, in nine cases out of ten, that it will be utterly unsafe for a jury or court to follow, or adopt, the conclusions of either side.

The jury must exercise their own judgment and good sense after all, and do justice accordingly, profiting by the aids derived, from the conflict, but in spite of the obstacles it creates. Insanity is a disease of the mind; and physicians, with all the

science they possess, are as yet like the masses of mankind, without any certain knowledge of the nature of the thing disordered. They know, and all men know, that mind exists. By the results it produces in a healthy state, all men have equal evidence that it is; but what it is, how to fathom, span, or define its nature, is what we lack direct facts and analogies to enable us to do. Philosophers and physicians are here upon a level with the common masses of our race, and if wiser upon the subject, it is because they have been more astute and attentive observers. Every one who associates with his species, acquires, daily, correct knowledge of the natural operations of the human mind, and a capacity to form an opinion, if there should happen to be an aberration from the path of sanity, in any of his constant associates. The ability to form a just conclusion will depend much upon his native intelligence and accuracy of observation. Haslam, page 5, and Shelford, 70, remark "that it has been questioned whether medical evidence to prove insanity, be not inferior to that of other people who may have had opportunities of observing the individuals, when the same opportunities have not been in the power of the practitioner." It may be impossible for a physician, who has not become familiar, by experience, with some of the peculiar, indefinable, but certain indicia of insanity, in a case where it is feigned, to determine that it is so, without watching the patient by night, as well as by day, for some time, and when he does not know that he is watched, to see whether he can resist hunger, cold, and sleep, and whether his conduct affords any sure test to distinguish feigned appearances, assumed for a particular purpose, from a case of real disordered intellect. It is idle to suppose that none but medical men can do this; and as idle to assume that, when done by an intelligent observer, his conclusions would be worthless. Doubtless an opinion formed by a person, professionally conversant with the disease, upon the same observations, would be the most reliable; but if formed upon any relation of the facts which the observer would be able to give, it would be difficult to say, in many cases, that it would be the safest.

A careful daily observer of a person feigning madness would witness innumerable acts, motions, and expressions of countenance, which, with the attending incidents and circumstances, conclusively satisfying him of the fictitious character of the pretended malady, but which he could never communicate to a jury or scientific man, so as to give them a fair conception of their real importance. From poverty of language, these facts, should

a witness attempt to detail them, would necessarily be mixed up with opinions, general or partial, in spite of his best efforts to avoid it. There are things well known to all persons which our language only enables us to express by words of comparison—such are the peculiar features of the face indicating an excitement of the passions, affections, and emotions of the mind, as hope, fear, love, hatred, pleasure, pain, etc. Testimony affirming the existence or absence of either of these, is but a matter of opinion. So the statement of the fact that a man's whole conduct is natural, is but the opinion of the witness, formed by comparing the particular conduct spoken of with the acts of the past life of the individual. It would hardly be claimed that such evidence should be excluded, yet it is equivalent to an opinion that the person is sane. We are not now considering whether professional witnesses shall be permitted to give an opinion upon the question of sanity, and under what circumstances, but whether, in the absence of such testimony, and under any circumstances, an opinion may be evidence, coming from a non-professional witness. To test the propriety of the thing, let us suppose a case of simulated or real insanity to be tried, in which no scientific person could be had to speak as to any prior and attending conduct or appearances, and when the jury must be left to decide the issue from facts unprofessionally detailed to them by the neighbors and acquaintances of the party. Can it be supposed that they would be more likely to form a correct opinion upon such a statement of facts, unaided by the inferences and impressions made upon the witnesses familiar with the ordinary conduct of the individual, than the opinion of those witnesses, formed upon the same facts, better understood, one step farther removed from uncertainty and misapprehension, and aided and illustrated by many minute acts and expressions, etc., which could never be related? Common sense teaches every person that they could not; and it will follow that there is no sound reason for excluding the opinion, as limited, from the jury, and that sanity ought to be held an exception to the general rule; but, at the same time, we by no means intend to undervalue the importance of the opinions of scientific men when properly given. Medical testimony is of too much importance to be disregarded. When delivered with caution, and without bias in favor of either party, or in aid of some speculation and favorite theory, it becomes a salutary means of preventing even intelligent juries from following a popular prejudice, and deciding a cause on inconsistent and unsound principles.

But it should be given with great care and received with the utmost caution, and, like the opinions of neighbors and acquaintances, should be regarded as of little weight if not well sustained by reasons and facts that admit of no misconstructions, and supported by authority of acknowledged credit: See Smith's Anal. 197.

It is contended that the testimony was admitted contrary to all the authorities. We are prepared to admit that there are some against it; but the authorities are conflicting. In the probate of wills, and in issues to try their validity, the subscribing witnesses are allowed and required to state that, in their opinion, the testator was of sound and disposing mind and memory. In the English ecclesiastical courts, which have exclusive jurisdiction on the subject, "when the evidence proves the execution of a will, but the witnesses have not been examined as to the sanity of the testator, the cause will be adjourned, and liberty will be given to exhibit an interrogatory to prove his sanity:" See 6 Russ. 526, 527; *Wallis v. Hodgeson*, 2 Atk. 56. In *Lowe v. Jolliffe*, 1 W. Bl. 365, on an issue, out of chancery, *devisavit vel non*, the subscribing witnesses to a will and codicil, and about a dozen servants of the testator, swore him to be utterly incapable of making a will; and, to contradict this evidence, several of the nobility and gentry who were acquainted with him, and two physicians, all deposed to his entire sanity. The latter evidence prevailed, and three of the subscribing witnesses were afterwards convicted of perjury. In the case of *Dew v. Clark*, 1 Flagg, 18; and 3 Add. 79, 209, the validity of the will of Ely Stott was successfully contested on the ground of monomania; and, on the trial, several of his friends and acquaintances testified "that they never considered or even suspected that he was deranged in his mind." Some were medical men, and some not, but the opinions of all were received in evidence. In *Fuller v. Allison*, 3 Flagg, 527, 547, the testator's solicitors and physicians and the subscribing witnesses to the will, all testified their opinions as to his sanity. I have not been able to find that there was ever a contrary decision in the English ecclesiastical courts; although, at the trial, relying on the digests and elementary writers, I supposed that all the English authorities were the other way.

In Connecticut, witnesses who were not professional, were allowed to state their opinions, on the trial of a defense of lunacy, in connection with the facts on which they were formed: *Grant v. Thompson*, 4 Conn. 208 [10 Am. Dec. 119]. Judge Swift, in his

treatise upon evidence, treats sanity as an exception to the general rule, because "the testimony of witnesses on this subject will generally be in the shape of an opinion. But," says he, "they must detail the facts:" p. 111. In *Poole v. Richardson*, 3 Mass. 330, the subscribing witnesses were allowed to state their opinions of the soundness of the testator's mind, and other witnesses were allowed to testify to his appearance, and to any facts from which the state of his mind might be inferred, "but not to testify merely their opinions or judgments." A later case (*Buckminster v. Perry*, 4 Id. 593) may tend to explain this; for in that it appears that persons not professional, and not subscribing witnesses, stated their opinions. Parsons, C. J., in charging the jury, remarked, that the question was confined to the sanity of the testator at the time of making the will.

The supreme court of Pennsylvania held that facts, and opinions of sanity founded upon them, may, as to a testator, be received from any of his acquaintances: *Rambler v. Tryon*, 7 Serg. & R. 90 [10 Am. Dec. 444]; *Wogan v. Small*, 11 Serg. & R. 141. Similar evidence was received some twenty years since, in the circuit court of the United States, as appears from the charge of Justice Washington, in *Harrison v. Rowan*, Wash. C. C. 580; and in New Jersey, on the trial of Mercer for the murder of Heberton, the same species of evidence was admitted, on argument. On the trial of Gardiner, for the murder of Maria Buel, insanity was set up as a defense, and several of his neighbors testified that they did not consider him insane: *State v. Gardiner*, Wright, 398.

These cases seem to sustain the court, and show that there was no error in overruling the objection to the evidence given by William Domigan, and the other nine non-professional witnesses. The case of *McKee v. Nelson*, 4 Cow. 356 [15 Am. Dec. 384], supports the doctrine by strong analogy. It was held in that case that the opinion of a witness, that the plaintiff in an action for the breach of a marriage promise was sincerely attached to the defendant, was admissible. The court say: "It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury, but there are exceptions, and we think this one of them. There are a thousand nameless things, indicating the existence and degree of the tender passion, which language can not specify. The opinion of witnesses on this subject must be derived from a series of instances passing under their observation, which yet they never could detail to the jury."

Application refused.

INSANITY AS A DEFENSE ON AN INDICTMENT FOR CRIME: See a full discussion of this subject in note to *State v. Marler*, 36 Am. Dec. 402.

OPINIONS OF NON-PROFESSIONAL WITNESSES, where admissible to prove insanity: See *Dickinson v. Barber*, 6 Am. Dec. 58, and note; *Grant v. Thompson*, 10 Id. 119; *Doe v. Reagan*, 33 Id. 466.

THE PRINCIPAL CASE IS CITED in *Farrar v. State*, 2 Ohio St. 70, and *Blackburn v. State*, 23 Id. 165, as to what constitutes insanity; and in *Sileus v. State*, 23 Id. 101, to the point that the burden of proof is upon the defendant to establish insanity by a preponderance of evidence.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

GOWEN v. PHILADELPHIA EXCHANGE CO.

[5 WATTS AND BERGHANT, 141.]

OWNER MAY DEDICATE LAND TO PUBLIC USE BY ANY ACT sufficiently evincing his intent without a previous adverse user, and may also, it seems, restrict the enjoyment to particular seasons.

LEAVING LAND ADJOINING STREET, OPEN FOR OWNER'S CONVENIENCE, IS NO DEDICATION, but a mere revocable license to the public to use it as a footway.

CASE in the Philadelphia district court for obstructing the plaintiff's passage into the street, by erecting a wall in front of his door. The defendants, the Exchange Company, in 1837, had erected a building on their lot, leaving a space in front, open to the street, through which there were paved footways, used by passengers, one of which was between the Exchange building and the plaintiff's building, which adjoined it on the same street, the said footway being used in passing to the post-office and other offices in the Exchange building. The plaintiff had a door opening upon this footway, placed there in 1837. In 1839, the defendants erected a wall on their lot in front of this door, which was the obstruction complained of. On proof of these facts, the plaintiff was nonsuited and brought error.

Dallas and Mallery, for the plaintiff in error.

Price and Meredith, *contra*.

By Court, GIBSON, C. J. Though the anomalous doctrine of dedication to public use, or, more properly of a grant to the public without the intervention of a trustee, began so late as 1732, it is of still more modern growth. The first trace of it is

found in *Rex v. Hudson*, 2 Stra. 909, decided in that year; and the next in *Lade v. Shepherd*, Id. 1004, which was decided three years afterwards. It was then suffered to sleep till 1790, when it was awakened by *The Trustees of the Rugby Charity v. Merryweather*, 11 East, 375, note, and for the last thirty years it has been, of all others, the subject most frequently agitated in regard to grants of highways, and most prolific in decisions, without having its principles very definitely settled: at least nothing very definite, or of general application, seems to have been extracted from the cases by those who have collected them. Perhaps we have not even yet materials enough to generalize. But it is agreed, without a dissent, that an owner may dedicate his ground to public use by any act which sufficiently evinces his will, without a previous adverse user, which is evidence, but not exclusively so, of a grant; and that he may restrict the enjoyment to particular seasons, seems also to be agreed.

In *Rex v. The Inhabitants of Northampton*, 2 Mau. & Sel. 264, Lord Ellenborough, conceding that the user might be thus limited, denied that there could be any other restriction of it; and in *Roberts v. Karr*, 1 Camp. 262, note, Mr. Justice Heath thought there could not be a special dedication; though he admitted there might be a grant of a footway—a difference for which I am unable to find a reason. The point next came up in *The Marquis of Stafford v. Coyney*, 7 Barn. & Cress. 257, before the *puisse* judges, Bayley and Holroyd inclining to think there might be such a dedication, and Littledale doubting. But *Woodyer v. Hadden*, 5 Taunt. 127, contains something very like a recognition of it by another name; and it therefore merits a particular examination. The plaintiff had laid out a street over his ground to the defendant's close; and it was held not to be so dedicated to public use that the defendant might turn it to account by using it as a thoroughfare from his close at the further end—a principle in unison with that of *Kirkham v. Sharp*, 1 Whart. 334 [29 Am. Dec. 57], which was the case of a private alley. To lay out a street from one thoroughfare to another, would indicate, too clearly to be misunderstood, an intent to make the new street a thoroughfare also; but to lay out a street to a place which affords no outlet, though the new street were left to be lighted, watched, and cleansed, as that was at the public charge, would as clearly indicate the contrary. In *Woodyer v. Hadden*, what seems to have been a qualified dedication in substance, was called a license; and as a license is essentially revocable where a consideration has not been paid

for it, the word is equally convenient, and perhaps more significant. The further inquiry material to the case before us is, whether there can be less than plenary dedication of a place which is not, as the street was in *Woodyer v. Hadden*, a *cul de sac*.

I see no objection to it where the circumstances distinctly show that only a partial dedication was intended. We have just seen that where a proprietor lays out a street with only one outlet, he decisively indicates that it is not to be a thoroughfare; and that he may evince an intent to license and not to dedicate, is borne out by *Baraclough v. Johnson*, 8 Ad. & El. 99, in which the owner of ground, who had allowed the inhabitants of a hamlet and an iron company to use a carriage-way over it during nineteen years for a nominal consideration, and had left the way open to all persons besides, was not precluded from resuming his original right, the public user being qualified by the private privilege. There are a thousand circumstances connected with a man's calling, which imply a license to enter his premises, subject to his regulation and control. The publican, the miller, the broker, the banker, the wharfinger, the artisan, or any professional man whatever, licenses the public to enter his place of business, in order to attract custom; but when the business is discontinued, the license is at an end. It is a license which is dependent on the use of the property to which it is annexed, and which can not, without permission of the owner, be annexed to anything else; of which the building in which we are sitting (the Masonic hall) furnishes an apt illustration. Its apartments are let for balls, concerts, lectures, auctions, exhibitions, and other purposes which require that it be a place of public resort to make it profitable. In front of it is a quadrangular court of the breadth of the building and of the depth of forty-five feet, with a semicircular carriage-way from the street to the principal entrance, and out again. The rest of the space is paved, and the whole is used by passengers as a part of the public footway. Yet no one imagines that the proprietors might not put a stop to the public user by putting up a building in front; or that the owner of one of the contiguous houses might draw to it a part of the benefit by making a door in his side wall, and using the pavement as a footway to it. It may be said that such a court is a sort of *cul de sac*; but take another instance, very common in this city, of ground which is clearly not so. Many private dwellings in some of its principal streets were originally set back a few feet to leave room for a longer flight of

steps to the first floor, proportionately raised, than the space usually allotted to the purpose would allow; but when the tide of commerce which set into those streets had driven out the more opulent families, and turned these dwellings into shops, the steps disappeared, the floor was let down to the business level, and the front was brought forward to the common line of steps and cellar doors. In the mean time the unoccupied space between had been paved and used as a part of the footway, which it so closely resembled as not to be distinguishable from it. Yet, though there had been an actual user and apparent dedication of it, no one ever dreamt that these were to be perpetual; for it was obvious that the space had been left open for the accommodation, not of the public, but of the owner. To doubt it, would injuriously affect the value of a vast amount of property, and prevent builders from consulting their present convenience.

Might not this Exchange Company, on the same principle, pull down their building, cut up their ground into lots for stores, restore it to its former state, and thus revoke the public license to enter it? If they could do that, they can control the use of every part of it while the building is standing. The open ground belongs to the company, and adjoins the plaintiff's building on two of its sides. Besides the hall "where merchants most do congregate," the exchange contains offices for brokers, notaries public, insurance companies, and most of those who move in the train of commerce; and in the basement at the side next the plaintiff, are a coffee-house and the post-office, to which the public have access over the ground in question; and the plaintiff attempted to annex a part of the use of it to his building by means of a doorway, which the company obstructed by means of a wall on their own premises. The question was whether he and the public had the user by permission, or by indefeasible right; and we concur with the judge who tried the cause, that there was no evidence of such a right to be left to the jury.

Judgment affirmed.

DEDICATION, WHAT CONSTITUTES: See *Hobbs v. Lowell*, 31 Am. Dec. 145; *Vick v. Vicksburg*, Id. 167; *Valentine v. Boston*, 33 Id. 711; *Town of Lebanon v. Commissioners of Warren Co.*, 34 Id. 422; *Municipality No. 2 v. Cotton Press*, 36 Id. 624, and other cases cited in the notes to those decisions. In *Green v. Oakes*, 17 Ill. 252, the principal case is cited on the point, whether or not a presumption of dedication from a public user of a way across one's land, with the owner's acquiescence, can be rebutted. But the court give no opinion on that question. In *Tyler v. Sturdy*, 108 Mass. 201, the case is referred to, among others, as recognizing the doctrine that a public footway may be created by dedication.

NORMAN v. HEIST.

[5 WATTS AND SHERMAN, 171.]

BASTARD CAN NOT INHERIT at common law, nor can he transmit property by descent, except to his own issue.

STATUTE DECLARING CHILDREN OF DECEASED BASTARD CAPABLE TO INHERIT and transmit the estate of such bastard's deceased mother, as fully as if he had been legitimate, is unconstitutional, so far as it attempts to divest the estate of the mother already vested in her lawful heirs, though it may operate prospectively, if such heirs should die intestate and without issue.

EJECTMENT by the brothers and lawful heirs of Ann Ottinger, deceased, to recover certain land in the possession of the defendant, as husband of one of the daughters of Christopher Norman, deceased, the said Christopher being an illegitimate son of the said Ann. Christopher died in 1832, and his mother died seized of the premises in controversy, in 1840, leaving the plaintiffs her lawful heirs. In 1841 a statute was passed declaring the children of the said Christopher capable to inherit and transmit the estate of his mother as fully as if he had been legitimate. The validity of the statute was the question upon which the case turned. On a special verdict setting forth the facts, the court below gave judgment for the defendant, and the plaintiffs brought error.

Mulvany, for the plaintiffs in error.

Sterigere, for the defendant in error.

By Court, GIBSON, C. J. A bastard can not inherit, by the common law, because he is the son of nobody, and has the blood of no ancestor in him; neither can he transmit his property by descent, except to his own issue. Then what is this statute? "The children and heirs of Christopher Norman, a natural son of Ann Ottinger, deceased," say the legislature, "shall be able and capable, in law, to inherit and transmit the estate of the said Ann Ottinger, and any other, as fully and completely, to all intents and purposes, as if the said Christopher Norman had been born in lawful wedlock; and the said children and heirs shall enjoy all the rights, benefits, and advantages of children whose ancestors were born in lawful wedlock." Not a word in this about divesting the estate which had vested in Ann's brother at her death. All the provisions of the statute are enabling and prospective, and their object is distinctly to give the blood of Christopher Norman, dead, an inheritable source, as well as a descendible quality, which it had not when

he was living; and to give his children a capacity to take, through him, whatever estate should descend to them from any of his maternal ancestors. Such is the import of the context as well as the meaning of the words. The estate which passed to Ann's brothers, by the intestate laws, may even yet descend to them in default of issue of the brothers, and thus the statute have a legitimate effect. We dare not say that more was intended, and by that accuse the legislature of an attempt to break their promise in the presence of Almighty God, to support the constitution, which declares that no citizen shall be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land. What law? Undoubtedly, a pre-existent rule of conduct, declarative of a penalty for a prohibited act; not an *ex post facto* rescript or decree made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it, if such rescripts or decrees were allowed to take effect in the form of a statute. The right of property has no foundation or security but the law; and when the legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen will be no more. This estate was lawfully vested in the plaintiffs, who were the next heirs to their intestate sister, at her death; it was theirs in full property; it was guaranteed to them by the constitution and the laws; and to have despoiled them of it in favor of the supposed natural right of the grandchildren would have been as much an act of despotic power, as it would had the grandchildren been strangers to the intestate's blood. Take it that they had the same claim, on the score of birthright, which their father might be supposed to have had; yet still, as title is the creature of civil regulation, even a legitimate child has no natural right of succession to the property of its parent.

The right of a proprietor, living or dying, to pass by those who are nearest in blood to him, and bestow his bounty on strangers, is one of the most sacred incidents of ownership; and it is very often exercised. This intestate had a right to give her estate at her pleasure; and she did no less by leaving it to pass to her legitimate brothers by the intestate laws, instead of giving it to the children of her illegitimate son by will. Who can say that this was not the result of design, or that her brothers were not as dear to her as her grandchildren? Few parents think it just to put an illegitimate child on a footing with their legitimate offspring; and when they come to weigh the claims of

brothers and sisters against those of illegitimate descendants still more remote, they may naturally choose to give the former the preponderance. The grandmother, in this instance, must be supposed to have known the consequences of dying without a will; and her intestacy was perhaps less the effect of accident than design. Had the legislature said otherwise, they would have spoken too confidently about a matter in regard to which every one is peculiarly liable to be mistaken. The difficulty of even approximating the truth of such a case, shows how readily they would slide into error, were they to exercise a power to regulate the titles to property by their sense of natural justice, and make wills for those who do not choose to make them for themselves. Happily, they have no such power. It was deemed necessary to insert a special provision in the constitution to enable them to take private property even for public use, and on compensation made; but it was not deemed necessary to disable them, specially in regard to taking the property of an individual, with or without compensation, in order to give it to another, not only because the general provision in the bill of rights was deemed sufficiently explicit for that, but because it was expected that no legislature would be so regardless of right as to attempt it. Were this reasonable expectation to be disappointed, it would become our plain and imperative duty to obey the immediate and paramount will of the people, expressed by their voices, in the adoption of the constitution, rather than the repugnant will of their delegates, acting under a restricted, but transcended authority. But there has been no actual infringement of the constitution in this respect, and the effect of the statute, in regard to it, has been misconceived. Still, the happening of the contingency on which it may, by a remote possibility, vest the estate in the defendants, has not arrived; and the plaintiffs must have judgment.

Judgment of the court below reversed, and judgment here on the special verdict for the plaintiffs.

BASTARD COULD NOT INHERIT PROPERTY AT COMMON LAW: *Sneed v. Ewing*, 22 Am. Dec. 41. But in Maryland illegitimate children may inherit from their mother: *Helms v. Franciscus*, 20 Id. 402; and in Vermont illegitimate children of the same mother may inherit from each other: *Burlington v. Fosby*, 27 Id. 535. A bastard's mother can not inherit his estate: *Cooley v. Dewey*, 16 Id. 326. Under a devise to children, illegitimate children can not take, unless there is some other designation indicating that such is the intent: *Shearman v. Angel*, 23 Id. 166.

RETROSPECTIVE STATUTES.—As to when a statute may be construed so as to operate retrospectively, and the validity of such statutes, see the note to

Goshen v. Stonington, 10 Am. Dec. 131. See also *King v. Dedham Bank*, 8 Id. 112; *Merrill v. Sherburne*, Id. 52; *Dupuy v. Wickwire*, 6 Id. 729; *Smith v. Merchand*, 10 Id. 465; *Kennebec Purchase v. Laboree*, 11 Id. 79; *Lewis v. Brackenridge*, 12 Id. 228; *Bell v. Perkins*, 14 Id. 745; *Woart v. Winnick*, Id. 384; *Staniford v. Barry*, 15 Id. 691; *Bradford v. Brooks*, 16 Id. 715; *Peyton v. Smith*, 17 Id. 758; *Bleakney v. Farmers' etc. Bank*, Id. 635; *Sommers v. Johnson*, 24 Id. 604; *Davis v. Minor*, 28 Id. 325.

FEREIRA v. SAYRES.

[5 WATTS AND SERGEANT, 210.]

MASTER DISCHARGING SERVANT BEFORE THE END OF THE YEAR, where the hiring is by the year, is liable for wages for the full time.

DEATH OF PARTNER DOES NOT TERMINATE EMPLOYMENT OF AGENT of the firm, hired, by express contract, for a definite period, so as to defeat his claim for compensation for the full period.

DISSOLVED FIRM CONTINUES IN EXISTENCE for many purposes.

ASSUMPSIT for work and labor, etc. From certain correspondence introduced in evidence, it appeared that the plaintiff was employed, in 1833, by one Mansfield, now deceased, as the agent in the United States of the firm of *Fereira & Mansfield*, of Pernambuco, of which the said Mansfield was a member, and of which the defendants were surviving partners. The correspondence indicated that the hiring was by the year. Mansfield died in March, 1839. In February, 1839, Fereira, one of the defendants, wrote to the plaintiff, that as the firm desired to reduce expenses, they wished his services to cease at the end of the month. The plaintiff replied, that the contract with him was that his employment should not be discontinued until the expiration of any given year. The defendants, however, refused to pay him except to the end of February, 1839, and he brought this action. The court below instructed the jury: 1. That notwithstanding Mr. Fereira's letter, the defendants were liable to pay the plaintiff, unless he acquiesced in his discharge, to the end of the year on which he had entered before receiving the letter. 2. That Mr. Mansfield's death did not absolve the defendants from their liability to pay to the end of the year. Verdict and judgment for the plaintiff, and the defendants brought error founded on exceptions to the instructions.

E. Ingersoll and C. Ingersoll, for the plaintiffs in error.

Meredith, contra.

By Court, **ROGERS, J.** Whether there was a hiring for a year, was a fact for the jury, and if the decision of that question was

taken from them, it was erroneous. But the presumption is that the court have not violated so plain a rule of law; therefore he who alleges it is bound to prove it by the record itself. And this has been attempted, but, as we think, without success; for judging from the record and disregarding altogether the conflicting recollections of counsel, the case would appear to have been ruled on the conceded facts that there was a hiring for a stipulated time and price. And this is rendered more probable, because such is the clear result of the evidence as contained in the written testimony. The point in dispute would seem to have been, not whether there was a contract for a certain price, but admitting that to be so, whether the contracting partner had entered into an express agreement that the agency was only to be discontinued at the expiration of a given year. Mr. Ferreira was of opinion (and that was the point of difference) that in the absence of such an agreement the salary was to be paid only to the time the services of the agent ceased to be required. Now admitting the contract to be as stated, that is, an express contract, there was no error in answering the first point in the affirmative.

But, did the death of Mr. Mansfield absolve the defendants from all liability? or in other words, does the death of one of two or more copartners discharge a firm *ipso facto* from the obligation of an express contract? The affirmative of this proposition it would be difficult to maintain. If there was an agreement as to property (renting a house for example), the death of one, although it dissolves the partnership, does not release the firm from payment for the unexpired term. This will not be pretended; and yet there is nothing arising from the nature of the defendant's employment (which is described as an agency to drum up consignments and to attend to collections for the firm) that takes it out of the general principle. It is enough that there was an express and positive agreement, which can not be annulled except with the assent of both. The suit is brought against the surviving members of the firm, and this is right. There is no technical difficulty in the way, as, before the death of Mansfield, Mr. Ferreira undertook, without cause, to discharge the defendant from the service of the firm. Whether the old firm would be liable for services rendered in pursuance of the contract to the new firm, in this suit, it is unnecessary to decide. In some respects it would be convenient, as it would avoid the necessity of two suits; and perhaps would be just, as it would be in accordance with the contract as originally made. Although.

a firm may be dissolved, yet it may be considered as a subsisting partnership for many purposes.

Judgment affirmed.

MASTER DISCHARGING SERVANT HIRED FOR DEFINITE TERM before the end of the term, is liable for wages for the whole term, if the discharge was without cause, at a time when the servant can not procure employment elsewhere: See *Byrd v. Boyd*, 17 Am. Dec. 740. But a servant discharged for misconduct can not recover even his past wages: *Posey v. Garth*, 37 Id. 183; *Libhart v. Wood*, Id. 461, and notes.

DEATH OF PARTNER, EFFECT OF ON AGENCIES constituted by the firm: See the note to *Cassiday v. McKenzie*, 39 Am. Dec. 76.

DISSOLVED PARTNERSHIP CONTINUES for what purposes: See *Houser v. Irvine*, 38 Am. Dec. 768, and cases cited in the note thereto.

NYCE'S ESTATE.

[5 WATTS AND SHERMAN, 264.]

EXECUTORS INVESTING IN UNITED STATES BANK STOCK moneys which they are directed by the will to put "on interest to be well secured," and to pay the interest annually to the testator's wife during life, the principal to go to his children, are liable to the legatees over for a loss of the sum so invested, by the depreciation of the stock, with legal interest thereon from the time the legatees became entitled.

GUARDIAN OF INFANT LEGATEES EXPRESSING FAVORABLE OPINION OF INVESTMENT by executors in bank stock, of moneys to which the infants are entitled, does not thereby agree that the moneys shall be so invested, so as to debar his wards from holding the executors liable for a loss by depreciation.

LEGACY CAN BE GIVEN ONLY BY EXPRESS WORDS or probable implication.

BEQUEST OF "REMAINDER OF MY PERSONAL ESTATE, not hereinbefore nor hereinafter specified, etc., excepting what is herein reserved and bequeathed," carries the principal of a sum which in a previous part of the will is directed to be put at interest for the benefit of the testator's widow for life, where such principal is not otherwise disposed of, directly or by implication, and the whole tenor of the will indicates that the testator's intention was to bequeath his entire estate.

APPEAL by the executors of the will of one Nyce, from a decree of the orphans' court, settling their accounts. The facts and the questions arising on the appeal are sufficiently stated in the opinion of Bell, J., delivered in the court below.

BELL, President. The testator, by his last will, proved November 27, 1826, devised *inter alia* as follows: "I do order of what money in my house or *indue* me on obligation or otherwise at my decease, that my executors put the sum of five hundred pounds on interest, to be well secured, and so that my

well-beloved wife may draw the interest thereof annually during her natural life," etc., and appointed the accountants executors.

After the death of the testator and pending the life of the widow, in the year 1829, the executors vested the sum of five hundred pounds in shares of the capital stock of the Bank of the United States, a banking company incorporated by act of congress. This investment was made with the approbation of Samuel Shafer, guardian of three of the grandchildren of the testator, who, with others, were entitled to the principal sum after the death of the widow. Mr. Shafer testifies that he considered it a safe investment at the time, and in fact made the purchase at the request of the executors, but adds, that he did not consider he was assuming any responsibility by recommending the investment. During the life-time of the widow, the value of this stock greatly depreciated and has continued to depreciate, so that at this time it is worth very little if anything. The widow being dead, the parties in interest have called on the executors to account, and under exceptions filed to the report of auditors, who charged them with the whole amount laid out in the purchase of these shares, the question is presented whether, under the circumstances, these trustees are liable to make good the loss which has happened from the fall of this stock.

It is said to be the harshest demand that can be made in equity, to compel a trustee to make up a deficiency, where the money has not come into his hands. In such a case equity will not charge him unless he has been guilty of negligence so gross as almost amounts to fraud: *Pim v. Downing*, 11 Serg. & R. 66; *Johnson's Appeal*, 12 Id. 317; *Konigsmacher v. Kimmel*, 1 Penn. 213 [21 Am. Dec. 374]. If he exercise so much caution in respect to the trust fund, as a prudent man would in regard to his own money, and a loss happen, equity will excuse him. But all the authorities distinguish between such a case and that where the trustee has actually received the fund. He is then bound carefully to secure the money which comes to his hands, and if he fail to do so, and a loss happens, he is responsible. What shall be such apparently adequate security as will excuse a trustee, has been the subject of some diversity of opinion; but it now seems to be agreed that the personal security of an individual is insufficient: *Ryder v. Bickerton*, cited in *Walker v. Symonds*, 3 Swan, 81, note a; *Adye v. Feuilleateau*, 1 Cox, 25; *Holmes v. Dring*, 2 Id. 1; *Pim v. Downing*, 11 Serg. & R. 66;

King v. King, 3 Johns. Ch. 552; *Smith v. Smith*, 4 Id. 281; unless the trustee be authorized by the instrument creating the trust to lend on such security; and it is settled, in England, that a trustee may not invest the trust fund in the stock of any private company, as South Sea stock, bank stock, etc.; for the capital depends upon the management of governors and directors, and is subject to losses: *Lewin on Trusts*, 308; and because chancery does not lay out or leave property in bank stock; and what the court will decree, it expects from trustees and executors: *Howe v. Earl of Dartmouth*, 7 Ves. 150. And it is said, that in the absence of any express power to do otherwise, the only unobjectionable investment is in one of the government or bank annuities: for here, as the directors have nothing to do with the principal, but merely superintend the payment of the dividends and interests till such time as the government may pay off the capital, it is not in their power by mismanagement or speculation to hazard the property of the shareholder: *Per Lord Hardwicke*, in *Trafford v. Boehm*, 3 Atk. 444. The recent history of banking in this country shows the value of this reason, and almost compels us to the conclusion that here, as it seems to be considered there, the capital stock of a bank is little, if any, better than the mere personal security of an individual.

The general rule in the English chancery is, that a trustee will be protected only where he invests in such securities as the court would decree on application. So far has this rule been extended, that it has been questioned whether it was safe for an executor to lay out money on a real security, and one that there was no ground at the time to suspect: *Brown v. Litton*, 1 P. Wms. 141; though the better opinion seems to be, that he would be protected in case of loss: *Knight v. Earl of Plymouth*, 1 Dick. 126; *Pocock v. Reddington*, 5 Ves. 800. To invest our orphans' courts with a power of direction similar to that exercised by chancery, it is enacted by the acts of the eighteenth of February, 1824, and the twenty-ninth of March, 1832, that wherever an executor, administrator, guardian, or trustee, has in his hands any money, the principal or capital whereof is to remain for a time in his possession, or under his control, and the interest, profits, or income thereof only is to be paid away, such trustee may present his petition to the orphans' court of the proper county, stating the circumstances of the case, and the amount or sum of money which he is desirous of investing: whereupon it shall be lawful for the court, upon hearing and

due proof of the circumstances, to make an order directing the investment of the said money in the stock or debt of the United States, or in the debt of the commonwealth of Pennsylvania, or in the debt of the city of Philadelphia, or in real security; and in case the money be invested in conformity with such direction, the trustee shall be exempted from all liability for loss on the same, in like manner as if the investment had been made in conformity with a similar direction in the wills or other instruments creating the trust, or by a law of this state.

It is not now necessary to decide whether, since the enactment of these statutes, a trustee, with general authority, would be justified in loaning the trust fund on any other security than those pointed out in the acts, as I am of opinion that the will of John Nyce conferred on the accountants only a limited or restricted power as to the nature of the security on the faith of which they were to put out the fund of five hundred pounds. If this be so, and they have selected a security of a different nature, it is not denied but that they did so on their own responsibility, and at their own risk, and must suffer for the loss which has ensued.

In endeavoring to ascertain the intention of the testator in that part of the will under consideration, we must take the language used in its common and ordinary acceptance—in that sense in which it is received by the mass of the community in which the testator resided. The money was to be put “on interest, to be well secured, so that my well-beloved wife may draw the interest thereof annually.” When it is recollected that in our agricultural districts, and among our farmers, the phrase “putting out money at interest” means to loan money at the legal rate of interest, on the security of a mortgage or judgment, and when any other mode of investment is contemplated, a different phraseology is employed, we can not but understand the testator to have had in his mind’s eye a loaning on real estate, and in no other mode. It was to be “at interest,” and every one understands this to mean “legal interest:” it was to be “well secured,” and we all know what is meant by this term in the apprehension of our farmers, unengaged in speculation, trade, or manufactures; and this interest was to be received by his widow annually, according to the usual and almost universal practice in the country, of stipulating for the payment of interest of money loaned on bond or mortgage. But it has been ingeniously argued that purchasing bank or other stocks yielding a dividend, is only another mode of putting out money at interest, and,

therefore, taking the terms literally, these executors have not overstepped the law of the trust. But setting aside the words "to be well secured," which carry with them a peculiar and emphatic meaning, the answer is, that, in common parlance, neither among agriculturists, traders, nor dealers in stock, do the terms "put out on interest" convey the idea of a purchase of bank or other corporation shares; and it has already been seen that in construing instruments, and more particularly wills, we must assign to the language used the meaning it bears as employed in every-day and ordinary communication, unless indeed where strictly technical phrases are used. Applying this rule to the clause of the will under consideration, I think no candid mind can hesitate to arrive at the conclusion that the intent of the testator was that the five hundred pounds should be secured by mortgage or judgment on realty; and these executors having failed to do so, must, as already intimated, make good the loss. This may be, and doubtless is, a hard case, as I have no hesitation in believing that the accountants acted in good faith, under the full conviction that the stock at the time of their purchase was worth all they paid for it; but they took this risk upon themselves, and must bear the consequences of a mistake committed in common with many unfortunate and suffering persons.

But it is objected that at least the accountants ought to be allowed a credit to the amount of the interest in the five hundred pounds owned by the wards of Samuel Shafer. Without inquiring how far an express assent or request by Mr. Shafer, as guardian, to invest in the stock of the bank, would have released the executors from their obligation to follow strictly the directions of their testator, and exonerated them from their liability to his wards, it is sufficient to say that I do not understand from the testimony that any such assent was given, or request made. Mr. S. only says that he was consulted as to the purchase; that he considered it a safe investment at the time; and that the purchase was made with his approbation; but expressly repudiates the idea, that in recommending the investment he assumed any responsibility. All this amounts to nothing more than that he entertained and expressed an opinion as to the safety of the contemplated investment, or, if you please, recommended it; but by no means amounts to an agreement made by him on the part of his wards, that the money should be so disposed of. If such an agreement would exonerate the accountants, surely nothing short of it can have such effect. They were not bound by the guardian's opinion, or by his rec-

commendation; and if they chose to rely on the one, or follow the other, they did so at their own risk. This view renders it unnecessary to decide the point made on the argument, whether the grandchildren of the testator take any, and if so, what interest under the will? Wherefore the exceptions taken on the part of the accountants to the report of the auditors are overruled, and the report in this particular is confirmed.

William Nyce also excepts to the report, that the auditors ought to have charged the trustees with interest on the trust fund in their hands from the death of the widow of the testator, January 28, 1840. This position is too plain to admit of dispute, and it was accordingly conceded in the argument that if they are liable for the principal sum, they are also liable for legal interest thereon from the time the grandchildren became entitled to it. Wherefore the exception taken by William Nyce is sustained, and it is accordingly decreed and ordered that there be added to the sum of one thousand three hundred and fifty-six dollars and eighty-three cents (the balance reported by the auditors), the sum of one hundred and forty-two dollars and forty-five cents, interest for one year and nine months, making an aggregate sum of one thousand four hundred and ninety-nine dollars and twenty-eight cents, balance decreed to be in the hands of the accountants.

2. The contest, in this case, involves the question whether the testator died intestate, as to the sum of five hundred pounds, the interest of which was to be paid to his widow during his life, or whether it passes under his will. It is impossible to consider this will as a whole, as we are bound to do, without being forced to the conclusion that, by it, the testator intended to dispose of all his estate, real and personal. By the introductory clause he declares, "As for what worldly estate wherewith it hath pleased God to bless me with in this life, I give and dispose of the same as followeth." This, although not sufficient, of itself, to carry an estate or legacy clearly omitted, is strong evidence of a general intent not to die intestate as to any portion of the party's estate. But, in addition to this, we have the labored and detailed provisions of this instrument, which strongly manifest the anxious desire of the testator to distribute all his property, real and personal, equally among his grandchildren, after making provision for the comfort of his wife, and bequeathing small legacies to his daughter Catharine Templin, and grandson Levi Nyce. It is true, that although the intention may have been entertained, if it be not expressed by apt

provisions in the will, we can not give effect to it, for *voluit sed non dixit* is not enough: *Bradford v. Bradford*, 6 Whart. 244. To entitle a claimant to a legacy, it must be granted by express words, or by probable implication: *Weyerbach v. Weyerbach*, 5 Id. 583; and if neither are to be found within the four corners of the will, the claim must fail. But is there not an express bequest of the five hundred pounds in question contained in this will? After the introductory clauses already noticed, and a direction for the payment of debts and funeral expenses, the testator declares: "I give and bequeath unto my grandson Levi Nyce, one hundred dollars, lawful money, out of my personal estate, immediately after my decease; and further I do order of what money in my house or money *indue* me on obligation or otherwise at my decease, that my executors put the sum of five hundred pounds on interest, to be well secured, and so that my well-beloved wife may draw the interest thereof annually during her natural life, as also my household furniture to be at her own disposal, which I may have at my decease, and the remainder of my personal estate, if any shall be not hereinbefore nor hereinafter specified, to be equally divided to and among my grandchildren, share and share alike, excepting what is herein reserved and bequeathed."

A bequest of the residue, or remainder of personal estate, or words of similar import, gives to the legatee everything which may accrue by accident or contingency, and which, at the testator's death, turns out not to be specifically disposed of: *Crooke v. De Vandes*, 9 Ves. 197; *Duhamel v. Ardovin*, 2 Ves. sen. 162; *Jackson v. Kelly*, Id. 285; *Devese v. Pontet*, 1 Cox, 188. So broad is the operation of a residuary clause, that it carries not only what the testator had at the time of making his will, but whatever personalty he dies possessed of not otherwise bequeathed: *Bac. Abr.*, tit. Leg., b. 3; *Countess of Bridgewater v. Bolton*, 1 Salk. 237; *Sayer v. Sayer*, 2 Vern. 688; *Masters v. Masters*, 1 P. Wms. 424; and this rule is carried so far, that if a bequest be void, or if a legatee dies in the life-time of the testator, or is incapable of taking, or if the property is given on a contingency which does not happen, the legacy, in all these cases, falls into the residue, and goes to the person to whom that is given: *Durour v. Motteux*, 1 Ves. sen. 320; *Shanley v. Baker*, 4 Ves. jun. 732; *Oke v. Heath*, 1 Ves. sen. 141; *Attorney-general v. Johnstone*, Ambl. 580; *Dawson v. Clark*, 15 Ves. 415, 417; *Brown v. Higgs*, 4 Id. 708; *Duke of Marlborough v. Ld. Godolphin*, 2 Ves. sen. 61; *Cambridge v. Rous*, 8 Ves. 12; *Roberts v. Cooke*, 16 Id. 451; *Ward on Leg.* 30, 31. This

is, in general, the legal effect of such a bequest, and will always prevail, unless an intention be manifested to confine its operation to a particular fund, or specific portions of property, or the testator employs expressions showing a determination to restrict it to a more limited sense; as if he bequeaths as residuum, "all things not before bequeathed," or directs that legacies which may fail shall not fall into the residue, or reserve for further disposition, by codicil, certain things which he subsequently neglects so to dispose of: *Wilde v. Holtzmeier*, 5 Ves. 811; *Green v. Scott*, 1 Ves. jun. 282; *Cook v. Oakley*, 1 P. Wms. 302; *Attorney-general v. Goulding*, 2 Bro. 428; *Devese v. Pontet*, 1 Cox, 188; *Sadler v. Turner*, 8 Ves. 617.

Upon these principles, the sum of five hundred pounds, part of the testator's personal estate, not being specifically disposed of by the will before us, will go to the residuary legatees, unless an interest to limit and control the legal operation of the residuary bequest be somewhere discoverable. It is said that in this case such an intention is manifested, because the testator only disposes of, as residuum, all his personal estate, "if any shall be not hereinbefore or hereinafter specified:" that the five hundred pounds is thereinbefore specified or mentioned, to wit, in the gift to the widow of its interest, and consequently, by the operation of these words is withdrawn from the influence, and does not pass by virtue of the bequest of the residue. It is true, that this will is very awkwardly and inartificially expressed; but when we consider the whole of this clause, I think it will be perfectly plain that this argument assigns to the word "specified," as here used, a meaning much too limited. By this clause is given the remainder of my personal estate, if any shall be not hereinbefore nor hereinafter specified, to be equally divided, etc., excepting what is herein reserved or bequeathed. It is obvious, as well from the whole context of the will as from the peculiar phraseology of the clause in question, that the words, "specified," "reserved," and "bequeathed," occurring, as they do, in the same sentence, and having reference to the same subject-matter—for it will not do to say that the word "specified" refers to one portion of the personalty, and the words "reserved" and "bequeathed" to another—were used by the testator as synonyms, and as applicable only to the bequests he had before made in favor of his grandson Levi Nyce, and his wife, and the legacy he afterwards gives to his daughter Catharine Templin; for it is incredible, that after setting out with a declaration of his intention to dispose of the whole of his estate, real and personal, and

showing by almost every line and letter of his will that he held that purpose steadily in view, he should altogether have omitted to make a final disposition of the large sum of five hundred pounds. It is impossible he could have forgotten it, for it is mentioned in the sentence immediately preceding, and grammatically connected with the residuary bequest. As, then, the words of this clause are broad enough, without violating any natural meaning, to carry this portion of the estate, we must permit it so to pass, or assume the startling position, that although intending originally to devise his whole estate, the testator, without any apparent reason, momentarily abandoned his design, and immediately after resumed it. To induce us to adopt this notion, the language used in restraint of what has been shown to be the legal effect of a bequest of the residue, ought to be clear and unequivocal, and I find none such employed in the clause in question, or other parts of this will. On the contrary, to assign it such interpretation would be to defeat the manifest general intent, and that, too, when the word relied on by the counsel for the defendant does not imperiously or even necessarily require such meaning to be assigned it. The prayer, therefore, of the complainants' bill for a distribution among the surviving grandchildren must be granted.

Lewis, for the appellants.

Darlington, *contra*.

By COURT. The law of the case has been so fully and accurately stated by the president of the orphans' court, that it is unnecessary to do more than express the concurrence of this court in the opinions delivered by him.

Decree affirmed.

INVESTMENTS WHICH TRUSTEES MAY MAKE WITHOUT BEING LIABLE FOR LOSS—GENERAL DOCTRINE.—It is an ancient principle of the English equity system that a trustee, though not entitled to compensation for his services, is yet to be held to a very rigid accountability in the execution of the trust. Nowhere is this principle more conspicuous, than in the rule which holds the trustee liable for a loss occasioned by an improper investment, even though such investment has been made in the utmost good faith and solely for the advancement of the objects of the trust, without any view to personal profit. It is his duty to invest on good security: *Commissioners v. Walker*, 38 Am. Dec. 433. Where an unauthorized investment is made and a loss happens, the trustee is invariably liable; and his good faith, purity of intention, and subsequent diligence in endeavoring to prevent the loss, will be no protection to him, unless the *cestui que trust*, being a person under no disability, has, with a knowledge of all the facts, acquiesced in the investment: *May v. Duke*, 61 Ala. 53. But if he has acted with due prudence, discretion, and

diligence, and in accordance with the established rules of equity in making the investment, and in endeavoring to prevent a loss, he is not chargeable with any deterioration of the security or property in which the fund is laid out. The general rule on this subject is very clearly and concisely stated by Lord Chancellor Cottenham in *Clough v. Bond*, 3 My. & C. 496, where he says: "It will be found to be the result of all the best authorities upon the subject, that, although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it, yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from improper motive."

Certain formal rules have been established in England, and in several of the states of the American union, prescribing particular classes of investments which a trustee may safely make, and others which he may not make, except at the risk of personal liability for any loss which may arise from such investments; but the general principle which lies at the foundation of these rules is, that the trustee, in order to protect himself from responsibility, must act with the prudence and care which prudent and cautious men employ in their own affairs of like character, keeping in view the purposes for which the investments are made. This principle, with its qualifications, is thus stated in *King v. Talbot*, 40 N. Y. 85, by Woodruff, J., delivering the opinion: "My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance, and the considerations, which alone induce men of suitable experience, capacity, and responsibility, to accept its usually thankless burden, is, that the just and true rule is, that the trustee is bound to employ such diligence and such prudence in the care and management as, in general, prudent men of discretion and intelligence in such matters, employ in their own like affairs. This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and, of course, everything that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made. It, therefore, does not follow, that because prudent men may, and often do, conduct their own affairs, with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the trust itself, and are to be primarily regarded."

SAFETY OF THE CAPITAL AND CERTAINTY OF REGULAR INCOME are, as stated in the opinion just quoted, the prime considerations in determining whether an investment of trust funds has been judiciously made. Of these the safety of the capital is the more important. "Safety," says Woods, C. J., in *Kimball v. Reding*, 31 N. H. 352, "is the primary object to be secured in an investment of this kind." Safety is not to be sacrificed to secure a larger immediate income, where a remainder is given after a life estate in the trust fund. Therefore, in such a case, the security must be of a permanent character, even though a large discretion as to investments is conferred upon the

trustee by the instrument creating the trust: *Stewart v. Sanderson*, L. R., 10 Eq. 26. Thus, where by a marriage settlement a portion was settled on a husband and wife and the survivor of them, and afterwards upon their issue, a purchase of an annuity for one life, with an insurance upon the life, was held not to be a proper investment, although the trustees were empowered to call in money already invested and to lay it out at a greater interest if they could: *Fitzgerald v. Pringle*, 2 Moll. 534. But income from a trust fund is a very necessary object of its investment, and to secure such income the property behind the security should be productive: *Garesché v. Priest*, 9 Mo. App. 270. Hence, an investment in shares of stock in a railroad not yet constructed, or in the stock of a manufacturing company whose works are yet unfinished and its capital stock not paid up, is improper: *Kimball v. Reding*, 31 N. H. 352; *Adair v. Brimmer*, 74 N. Y. 552; *Pray's Appeal*, 34 Pa. St. 100. "It can not be pretended," says Rapallo, J., in *Adair v. Brimmer*, 74 N. Y. 100, "that a trustee would be justified in investing trust funds on the security of an unconstructed railroad." Speaking of such an investment by a trustee, Woods, C. J., in *Kimball v. Reding*, 31 N. H. 352, says: "If he invests in property, it ought to be property which yields an actual income, and which has a valuation, in the general sense of the community founded on that income, and not upon remote eventualities and a succession of contingencies. If his discretion under the trust extends to the buying of stocks at all, as to which the case does not call for our opinion, his purchases should be limited to such as have a value in market, based upon a regular income, or at least upon an income, that upon an average for a considerable period, may fairly be deemed equivalent."

INVESTMENTS MADE UNDER DIRECTION OF A COURT of competent jurisdiction are no doubt sufficient for a trustee's protection. In New Hampshire it is held that the court of chancery may give directions respecting investments by trustees either by a general rule or by an order made in the particular case: *Wheeler v. Perry*, 18 N. H. 307. In many of the states provision is made by statute, for investments by guardians and other fiduciaries to be made under the sanction and direction of courts of probate or other courts. In California there is such a statute respecting investments by guardians, and it has been determined that if a guardian makes an investment without the order of the court, he does so at his own risk, as a general rule: *Re Cardwell*, 55 Cal. 137. Under a statute in New Jersey providing for investments under the direction and sanction of the orphans' court, it was held that the order must be obtained before investment in order to protect a trustee laying out money on personal security, and that after a loan on a bond an order that the money remain at interest would be no protection: *Gray v. Fox*, 22 Am. Dec. 508. The Georgia code of 1863 provided that all investments by trustees, unless made in public securities, must be made on the order of a competent court: *Brown v. Wright*, 39 Ga. 96.

It is held in some of the English cases that where a trustee makes an investment in any security other than that in which the court itself would direct it to be made, if applied to, he does so at his own risk: *Hancom v. Allen*, Dick. 498. See also the authorities referred to, on this point, in the principal case. But this rule is not invariable. Thus, although the court of chancery in England would not formerly direct an investment on mortgage, a voluntary investment by the trustee on such a security, in the exercise of his discretion, would not, it seems, have been a breach of trust: *Band v. Fardell*, 7 De G. M. & G. 633.

INVESTMENTS IN GOVERNMENT SECURITIES.—The favorite securities of the

English courts for the investment of trust moneys have always been the public funds; and there is no question that a trustee so investing will be protected from liability for any loss by depreciation. Indeed, as we shall presently see, an investment by a trustee upon any other security, as for instance upon a mortgage of realty, was at an early period never sanctioned by the court except under very special circumstances. The reason for establishing such a rule was political rather than judicial. It is said to have been due to the fact that as England had a great public debt, the courts thought it to be their duty to sustain the national credit, and to recommend the government securities to the confidence of the people by directing all investments of moneys under their control to be made in such securities: *Barton's Estate*, 1 Pars. Eq. 28; *Brown v. Wright*, 39 Ga. 96. Until comparatively recent times our courts have had no such reason for manifesting their patriotism with other people's money; and the rule preferring government securities in the investment of trust moneys, so far as it has existed at all, has rested partly on precedent and partly on the obvious safety and stability of such investments: See the opinion of Woodruff, J., in *King v. Talbot*, 40 N. Y. 97; *Barton's Estate*, 1 Pars. Eq. 28; *Brown v. Wright*, 39 Ga. 96. The term "government securities" in Stat. 1 and 2 Viet., c. 117, relating to the custody of moneys subscribed for parliamentary undertakings, does not include exchequer bills: *Ex parte Chaplin*, 3 You. & C. 397. But it seems that trust moneys may be temporarily invested in such bills, pending a delay in the arrangements for a more permanent investment: *Matthews v. Brise*, 6 Beav. 239. In this country state bonds or stocks are included in the public securities in which trustees may safely invest: *Ackerman v. Emott*, 4 Barb. 626; *Lathrop v. Smalley's Executors*, 23 N. J. Eq. 192; *Tucker v. Tucker*, 33 Id. 235. And a trustee investing therein will be protected, it seems, even though the state debt should ultimately be repudiated: *Brown v. Wright*, 39 Ga. 96.

BONDS OF THE LATE CONFEDERATE GOVERNMENT of the southern states were not legitimate public securities, and a voluntary investment therein by a trustee being a direct contribution to the success of the rebellion, could not, as a general rule, be protected, even though approved by a probate court, under an act of the legislature: *Horn v. Lockhart*, 17 Wall. 570. On the other hand, it would be manifestly a very hard rule, under some circumstances, to hold a trustee liable for such investments. Many cases have arisen since the war in which the question as to the liability of trustees for moneys so invested has been involved. This mode of investment seems indeed to have been viewed with much favor by a good many trustees during the latter part of the war, when the bonds were greatly depreciated, their confidence in them appearing to increase in proportion as that of the people diminished. The decisions as to the liability of a trustee for trust funds laid out in such bonds are not at all harmonious. In *Watson v. Stone*, 40 Ala. 451, it was decided that an investment made by a guardian, in good faith, in confederate bonds, under an act of the state, passed November 9, 1861, was good, and that the guardian was entitled to credit for the amount of such investments. Subsequently, however, the act referred to was declared to be unconstitutional and void: *Houston v. Deloach*, 43 Id. 364; *Powell v. Boon*, Id. 459; *Horn v. Lockhart*, 17 Wall. 570. In that state it was held, in *Houston v. Deloach*, 43 Ala. 364, that a guardian, having in his hands funds of the ward received before the war, who loaned the same to a firm of which he was a member, and collected the amount in depreciated confederate currency during the latter part of the war, and invested the amount in confederate bonds, was liable for the loss. In the same case it was said that the liability of a guard-

ian for receiving confederate currency in payment of a claim due his ward's estate would depend upon circumstances. The Virginia legislature, in March, 1863, passed an act providing for the investment by a trustee of trust moneys in confederate bonds, where he had received the same "in the due execution of his trust." It is held, however, that a trustee is not protected by this act where he received money in gold before the war and invested it, in 1865, in confederate bonds, under an order of court: *Carter v. Dulaney*, 30 Gratt. 192; *Cole v. Cole*, 28 Id. 365. So a trustee collecting the amount of a specie ante-war debt, well secured by a mortgage on realty or otherwise, in depreciated confederate currency, during the war, and investing it in confederate bonds, will be liable for the loss of the fund: *Campbell v. Campbell*, 22 Id. 649; *Crickard v. Crickard*, 25 Id. 410; *Coltraine v. Worrell*, 30 Id. 434. But where confederate notes came into an executor's hands during the war, in the ordinary course of his duty, and, being unable to distribute the same because of the existence of the war, and because the legatees were scattered, he invested the amount in confederate bonds, he was held not to be liable: *Lingle v. Cook*, 32 Id. 262. Other cases in the same state, in which trustees investing trust funds in confederate bonds during the war were held not to be liable, are *Walker v. Page*, 21 Id. 636; *Myers' Ex'r v. Zetelle*, Id. 733. In South Carolina, also, it is held, that a trustee collecting a well-secured ante-war debt in depreciated confederate notes, during the war, and investing the same in confederate bonds, is liable for the loss: *Creighton v. Pringle*, 3 S. C. 77; *Cureton v. Watson*, Id. 451; especially where the instrument creating the trust directed the trustee to invest in lands or slaves: *Snelling v. McCreary*, 14 Rich. Eq. 291; *Sanders v. Rogers*, 1 S. C. 452. So where the direction was to invest "in some safe public securities, in the stocks of the city of Charleston, or the state of South Carolina:" *Womack v. Austin*, Id. 421. But where confederate currency came rightfully and legitimately into a trustee's hands during the war, and was invested in confederate bonds, he is not liable for the loss: *Hinton v. Kennedy*, 3 Id. 459; *West v. Cauthen*, 9 Id. 45. In several other cases arising in other states, it has been determined that a trustee obtaining payment of a debt created before the war, and well secured by mortgage, by collecting depreciated confederate notes and investing the amount in confederate bonds, would not be protected: *Purser v. Simpson*, 65 N. C. 497; *Fitzgerald v. Bailey*, 58 Miss. 658; *McBurney v. Carson*, 99 U. S. 567. In the latter case there appeared to have been collusion between the trustee and the original debtor, and it was therefore decided that the payment in confederate notes was no payment, and that the bond and mortgage were still subsisting. In Georgia, where funds received by a trustee before the war were invested in confederate bonds, the question as to his liability will depend upon how the money was turned into confederate notes: *Johnson v. McCullough*, 59 Ga. 212.

INVESTMENTS ON REAL ESTATE SECURITY.—It is said in *Ex parte Caihorpe*, 1 Cox's Ch. 182, decided in 1785, that it was formerly held that an investment of a lunatic's estate on a mortgage of realty was proper, but that in later times it was not so considered. Certainly there was a long period during which investments of trust funds upon real estate security were not favored in England, and the courts would neither direct nor sanction such an investment, except under very special circumstances: *Ex parte Ellice*, Jac. 234; *Ridgeway's Minors*, 1 Hogan, 309; *Wildowson v. Duck*, 2 Meriv. 494; *Norbury v. Norbury*, 4 Madd. 191; *Ex parte Franklyn*, 1 De G. & S. 228; *Barry v. Marriott*, 2 Id. 491; *Raby v. Ridehalgh*, 7 De G. M. & G. 104; 1 Perry on Trusts, sec. 457. Nearly all these decisions, however, were upon applications to the

court for leave to make such investments, and did not involve any question of liability for loss by reason thereof. Thus in *Norbury v. Norbury*, 4 Madd. 191, it was said that the court would not lay out an infant's money on mortgage, but in consols. In *Ex parte Franklyn*, 1 De G. & S. 228, an application for leave to lay out money on a mortgage was denied, and it was said that such an investment had many disadvantages as well as advantages. In *Barry v. Marriott*, 2 Id. 491, the court denied an application by a tenant for life for leave to have an investment transferred from consols to a mortgage, and the vice-chancellor remarked that "in ninety-nine cases out of a hundred the expenses arising from a mortgage security more than counterbalanced the increase of income." There were cases, however, in which the question arose upon an investment already made. Thus in *Raby v. Ridehalgh*, 7 De G. M. & G. 104, determined in 1855, it was held that a trustee would not be justified in laying out money on a mortgage, certainly where it was done at the instance of some of the beneficiaries, and without regard to the interests of others. Of course, where the investment was made after a decree to account it would not be permitted to stand. Such a case was *Widdowson v. Duck*, 2 Meriv. 494, in 1817, where executors, having laid out money on a mortgage, after such a decree, were ordered to pay the same into court. But the rule forbidding such investments was not invariable, and they were permitted under some circumstances: *Ex parte Johnson*, 1 Moll. 128. And in *Band v. Fardell*, 7 De G. M. & G. 633, it was held that a trustee, having a discretion, making such an investment, would not be liable as for a breach of trust, even though the court itself would not have made the investment. In that case, Turner, L. J., said: "It is also to be observed that the court, in administering a trust, never sanctions an investment on mortgage, except under very special circumstances, though such investment may be authorized by the instrument creating the trust: See *Ex parte Franklyn*, 1 De G. & S. 528. But no one ever thought that if, in such a case, a trustee, in his discretion, invested on mortgage, he was to be held liable as for a breach of trust, because the court itself would not have made such an investment." It is now settled in England, under Lord St. Leonard's act, 22 and 23 Vict., c. 35, sec. 30, that investments of trust funds on real estate security are proper: *In re Simson's Trusts*, 1 John. & H. 89; 1 Perry on Trusts, sec. 457. There is no doubt as to the propriety of such investments in the United States: 1 Perry on Trusts, sec. 458. Loans on suitable realty are regarded as among the safest that can be made, and such investments stand next in order to investments in government securities: *Gareschè v. Priest*, 9 Mo. 270.

WHAT CONSTITUTES ADMISSIBLE REAL SECURITY.—It does not follow from the fact that a mortgage upon sufficient realty is ordinarily a legitimate security for a loan of trust moneys, that every kind of real estate comes within the rule. It must be, it seems, property capable of producing an income. A mortgage upon a church building yielding no income is held not to be a proper security for a loan by an administrator, and is not sufficient to protect him from liability for a loss: *Gareschè v. Priest*, 9 Mo. App. 270. In that case, Lewis, P. J., says: "The property yielded no income whatever. Voluntary contributions by the members of a religious society largely in debt, and even the offerings of a reverential affection for the place of habitual worship, tendered in order to save it from alienation or sacrifice, can only be regarded in law as mere possibilities, and not to be taken into an estimate like the favoring chances of trade." So investments in the mortgage bonds of a coal mining company, issued for the purpose of raising money to construct a road to its mine, are not such as a trustee will be protected in, because the

security is purely speculative, being dependent on the success of the enterprise: *Adair v. Brimmer*, 74 N. Y. 539. The fact that a corporation in whose stock or bonds an investment is made by a trustee possesses real property, does not render it an investment upon a real estate security where there is no mortgage of any realty. Thus, an investment by a trustee in London dock stock and sewer bonds, was held not to be an investment upon real security within the meaning of the instrument creating the trust: *Robinson v. Robinson*, 11 Beav. 371, in which case Lord Langdale, M. R., said: "The estate was to be invested upon 'real security;' but the bonds were no real security to the bondholders. The commissioners have got real property, but it is not because a man derives his income from real estate, that therefore all his debts are a real security, which is really the extent of the argument. The debtor, or, in this case, the grantor of the bond, has an income out of which he is to pay the interest of the debt; but it does not therefore follow that the security is a real security." On an appeal in the same case, it was decided that an investment in turnpike bonds, secured by a mortgage or charge on the tolls and toll-houses, was an investment upon real security: *Robinson v. Robinson*, 1 De G. M. & G. 247. In *Mant v. Leith*, 15 Id. 524, the master of the rolls was "disposed to think" that a loan to a railway company upon the security of an assignment "of the said undertaking, and all future calls on shareholders, and all the rates, tolls, and sums of money arising from their act, and all the estate, right, title, and interest of the company in the same," etc., was a real security, although, on other grounds, it was decided that the investment was improper. In *Twaddell's Appeal*, 5 Pa. St. 15, an investment by a trustee in the loan of the Lehigh Coal and Navigation Company, unsecured by mortgage, was held to be in substance, though not in form, on real security, so as to protect the trustee against liability for a loss, because the company owned extensive coal lands and a canal, and was chartered to carry on the business of mining, shipping, and carrying coal, its landed capital alone vastly exceeding its debts. This, it will be perceived, is directly contrary to the doctrine laid down by Lord Langdale in *Robinson v. Robinson*, *supra*. An investment in the same loan was sustained where the direction in the will was to invest in any loans of the United States or the commonwealth, or of the city of Philadelphia, or any of its incorporated districts, "or in any public stocks or securities bearing an interest," on the ground that the loan in question was a "public security:" *Rush's Estate*, 12 Pa. St. 375. A mortgage by a member of a firm, of certain land to which he had the legal title, though it was in fact owned and used by the firm, was held to be a real security, within the meaning of a will, so as to protect the executor loaning money thereon under the advice of counsel, in *Miller v. Proctor*, 20 Ohio St. 442. A power to invest in "freehold, leasehold, or copyhold messuages," etc., in Ireland, authorizes a loan on a leasehold for lives perpetually renewable at a head rent: *Macleod v. Annesley*, 16 Beav. 600.

MORTGAGE OF SLAVES WAS CONSIDERED REAL SECURITY in South Carolina, especially as to slaves employed in agricultural labor: *Singleton v. Loundes*, 9 S. C. 465. And in Georgia a loan on a mortgage of negroes prior to the code of 1863, was regarded as a legitimate investment by a guardian, so as to protect him from liability for a loss occasioned by emancipation: *Brown v. Wright*, 39 Ga. 96.

FIRST MORTGAGE GENERALLY REQUIRED.—A loan by a trustee on a second mortgage, without other security, whereby he does not get the legal estate, is generally not sanctioned, especially where the security is not sufficient in value: *Norris v. Wright*, 14 Beav. 291; *Dosier v. Brereton*, 15 Id. 221; *Sin-*

gleton v. Lowndes, 9 S. C. 465; *Wilson v. Staats*, 33 N. J. Eq. 524. Thus, a loan on second mortgage on a house greatly out of repair, whereby the principal was lost, was held a breach of trust rendering the trustees liable, though there was a clause declaring that they should not be liable for deficiency in value "except through their own willful default respectively:" *Dosier v. Brereton*, 15 Beav. 221. But it is not so where the prior mortgage covers only a part of the property and the security is of ample value with respect to both mortgages: *Singleton v. Lowndes*, 9 S. C. 465.

RULE AS TO VALUE OF REALTY REQUIRED AS SECURITY.—"The ordinary rule, in strictness, is that upon a freehold security you must not advance more than two thirds of the value; but the rule does not apply to an advance on houses, in which case the advance should not exceed one half of the estimated value of the property:" *Norris v. Wright*, 14 Beav. 291; *Macleod v. Annesley*, 16 Id. 600; *Farrar v. Barraclough*, 2 Sm. & G. 231; *Wilson v. Staats*, 33 N. J. Eq. 524. If due prudence is not exercised with respect to value, the trustee will be liable for a loss: *Macleod v. Annesley*, 16 Beav. 600; *Farrar v. Barraclough*, 2 Sm. & G. 231. An investment of two thousand one hundred and eighty-three pounds on a two thousand eight hundred pound house in town occupied for commercial purposes, and dependent for its value, in some measure, on the performance of certain covenants, is improvident, and renders the trustee liable for any loss that may result: *Phillipson v. Batty*, 7 Hare, 516. A loan on second mortgage where both mortgages exceed two thirds of the value of the land is also improvident: *Wilson v. Staats*, 33 N. J. Eq. 524. In case of a loan on a leasehold for lives perpetually renewable at a head rent, the value of the property should be double the amount of the loan: *Macleod v. Annesley*, 16 Beav. 600. Vacant city lots three times the value of the sum loaned were held sufficient security to protect a trustee from liability although owing to subsequent depreciation he was compelled to buy in the property on foreclosure, to prevent a loss, and he was permitted to turn in the land as money: *Perrine v. Vreeland*, 33 N. J. Eq. 102, 596.

INVESTMENT IN REALTY OUTSIDE THE JURISDICTION, in another state or country, is generally at the trustee's peril, unless authorized by the instrument creating the trust: *Ormiston v. Olcott*, 22 Hun, 270. But where a testator directed an investment for the benefit of his daughter, on her marriage, "in such dwelling-house, land, furniture, and households, as they [the trustees] may deem proper for her," and the daughter married a citizen of North Carolina, and went there to reside, it was held that the investment might be made in that state, because it was apparent that the testator intended to provide a home for his daughter, and this could be done only by investing in North Carolina: *Amory v. Green*, 13 Allen, 413. A trustee may also take a mortgage on realty in another state, to protect the trust estate from a loss through a misapplication of trust funds by a co-trustee, where that is the only way in which the object can be attained: *Ormiston v. Olcott*, 84 N. Y. 339.

LOANS ON PERSONAL SECURITY.—It is well settled in England, except so far as the rule has been modified by statute, that a trustee, unless otherwise authorized by the instrument creating the trust, can not lay out trust funds upon any other than government or real securities except at his personal risk in case of loss. And the same rule prevails in New Jersey and New York, and in Pennsylvania, except where the investment is made upon the order of a court under the statute of 1832, in which case trust funds may be placed in stocks and bonds of certain municipal corporations: *Gray v. Fox*, 22 Am. Dec. 508; *Vreeland v. Vreeland*, 16 N. J. Eq. 513; *Halsted v. Meeker*, 18 Id.

136; *Lathrop v. Smalley*, 23 Id. 192; *Tucker v. Tucker*, 33 Id. 235; *Ackerman v. Emott*, 4 Barb. 626; *King v. Talbot*, 40 N. Y. 497; *Ormiston v. Olcott*, 84 Id. 339; *Hemphill's Appeal*, 18 Id. 303. In Massachusetts the English rule does not prevail, and "all that can be required of a trustee to invest is, that he shall conduct himself faithfully, and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested:" *Harvard College v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Id. 119; *Brown v. French*, 125 Mass. 410; S. C., 28 Am. Rep. 254. The rule established in South Carolina is substantially the same as that in Massachusetts: *Boggs v. Adger*, 4 Rich. Eq. 408; *Nance v. Nance*, 1 S. C. 209; *Mayer v. Mordecai*, Id. 383; S. C., 7 Am. Rep. 26. So in Georgia and New Hampshire the English rule has never been adopted: *Brown v. Wright*, 39 Ga. 96; *Davis v. Bagley*, 40 Id. 181; S. C., 2 Am. Rep. 570; *Knowlton v. Bradley*, 17 N. H. 458; *Kimball v. Reding*, 31 Id. 352. It is not proposed here to notice the statutes of any of the states on this subject, except so far as it may be necessary to do so incidentally.

It is clear that wherever the English rule prevails, a trustee taking mere personal security for a loan of trust funds, does so at his own risk, unless he has authority for such investment in the instrument creating the trust: *Walker v. Symonds*, 3 Swanst. 63, criticising *Harden v. Parsons*, 1 Eden, 145; *Pocock v. Reddington*, 5 Ves. 794; *Gray v. Fox*, 22 Am. Dec. 508; *Vreeland v. Vreeland*, 16 N. J. 512; *Swayser's Appeal*, 5 Pa. St. 377; *Will's Appeal*, 22 Id. 325. So where the loan is made solely on the debtor's note or bond, even though he be of undoubted credit: *Terry v. Terry*, Finch, 273; *Adye v. Feuilletreau*, 1 Cox's Ch. 24; *Keble v. Thompson*, 3 Bro. Ch. 112; *Gray v. Fox*, 22 Am. Dec. 508; *In re Foster's Will*, 15 Hun, 387; *Lacey v. Davis*, 4 Redf. 402; *Wynne v. Wynne*, 2 Heisk. 118. And even where the statute authorizes personal security, a trustee lending merely on the debtor's personal obligation will be liable: *Lee v. Lee*, 55 Ala. 590; *May v. Duke*, 61 Id. 56. So where the loan is made on a bond with surety: *Holmes v. Dring*, 2 Cox's Ch. 1; or on a joint and several note: *Moore v. Hamilton*, 4 Fla. 112; the trustee will be liable for a loss. "The bond of several persons can not be distinguished from the bond of one person," in such a case: *Holmes v. Dring*, 2 Cox's Ch. 1. The rule against personal security for trust funds is especially stringent where infants are concerned: *Gray v. Fox*, 22 Am. Dec. 508. Even where a trustee is clothed with a discretion as to the security by the instrument creating the trust, as where executors are directed to lay out money in the funds, "or on such other good security as they could procure and think safe," a loan on personal security will not be deemed a prudent exercise of the discretion: *Wilkes v. Steward*, G. Coop. 6. A loan for accommodation made to a man in trade, who has no property, is unauthorized, although the trustee is empowered to lend on real or personal security: *Langston v. Ollivant*, Id. 33.

In those states where the English rule on this subject has not been adopted, loans of trust funds on personal security may be allowed, under some circumstances, where there is no fault or negligence on the part of the trustee: *Knowles v. Bradley*, 17 N. H. 458; *Nance v. Nance*, 1 S. C. 209. But such a loan will not be justified in South Carolina except upon proof of its necessity and prudence, and of the impossibility of procuring real security by an exercise of reasonable diligence: *Nance v. Nance*, Id. 209; *Singleton v. Lowndes*, 9 Id. 465. In Massachusetts a loan on the note of a single individual or firm, except under extraordinary circumstances, will render a trustee liable for a loss: *Clark v. Garfield*, 8 Allen, 427.

DEPOSITS IN BANKS are loans without security, or upon personal security, and a trustee making such a deposit of trust funds, except in case of current collections of income, or where it is necessary to have a bank balance to fulfill the purposes of the trust, will be liable for a loss by the failure of the bank: *Lofft*, 492; *Moyle v. Moyle*, 2 Russ. & M. 710; *Lowry v. Fulton*, 9 Sim. 115; *Darke v. Martyn*, 1 Beav. 525; *Barney v. Saunders*, 16 How. (U. S.) 535. So though the trustee is authorized to invest "in bank or other stocks, mortgages, or other good security:" *Barney v. Saunders*, *supra*. And where by reason of a deposit in bank in the joint names of two administrators, one of them is enabled to abscond with the money, the other will be liable: *Clough v. Bond*, 3 My. & C. 490.

INVESTMENTS IN STOCKS OR BONDS OF PRIVATE CORPORATIONS stand on the same footing as loans on personal security where they are not protected by mortgages on realty, and therefore where the English rule prevails a trustee making such investments is liable for any loss that may accrue: *Trafford v. Boehm*, 3 Atk. 440; *Hynes v. Redington*, 1 Jones & La T. 589; S. C., 7 Ired. Eq. 405; *Ackerman v. Emott*, 4 Barb. 626; *King v. Talbot*, 40 N. Y. 476; *Ward v. Kitchen*, 30 N. J. Eq. 31; *Worrell's Appeal*, 9 Pa. St. 508. So of investments in stock of a suspended bank: *Morris v. Wallace*, 3 Id. 219; or in stock of a prospective railroad: *Kimball v. Reding*, 31 N. H. 352; *Adair v. Brimmer*, 74 N. Y. 552; or of a manufacturing corporation whose works are unfinished: *Pray's Appeals*, 34 Pa. St. 100. So of investments in the bonds of a municipal corporation: *Tucker v. Tucker*, 33 N. J. Eq. 235. And the fact that an investment in the stock of a corporation is generally regarded as a good and safe investment will not vary the rule: *Worrell's Appeal*, 9 Pa. St. 508, distinguishing and restricting *Thoddell's Appeal*, referred to under a former head in this note. Where a will directed an investment "in some good, secure, and profitable stocks or other securities," it was held that an investment in the stock of a railroad corporation at ninety-two per cent. of its face value, where there were first and second mortgages on the road, and the indebtedness exceeded the capital, was not a legitimate investment: *Ihmsen's Appeal*, 43 Id. 431. An investment in South Sea annuities or bank annuities, the capital of which is secured by government, is proper under a marriage settlement authorizing investment "in government funds or other good securities:" *Trafford v. Boehm*, 3 Atk. 440. But where a settlement empowered the trustees to invest in "securities of any colony or foreign country," an investment in bonds of a French railway, the payment of the capital of which in fifty years was guaranteed by the French government by means of a sinking fund, was held to be unauthorized: *In re Langdale's Trusts*, L. R., 10 Eq. 9. The Lord St. Leonard's act, heretofore referred to, authorizes investments of trust funds in East India stock: *In re Warde*, 2 John. & H. 191.

Where the English rule as to personal security does not obtain, an investment in the stock of a private corporation stands on the same ground as loans on private security generally, and if made with due prudence and caution the trustee will be protected: *Harvard College v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Id. 116; *Brown v. French*, 125 Mass. 410; S. C., 28 Am. Rep. 254; *Boggs v. Adger*, 4 Rich. Eq. 408. See also *Washington v. Emery*, 4 Jones' Eq. 32. Thus an investment in United States Bank stock at a time when it was in high credit was held proper in *Boggs v. Adger*, 4 Rich. Eq. 408. So an investment in the stock of the Commercial Bank of Natchez, where it was generally regarded by prudent and cautious men as a safe and profitable investment, under a will authorizing investment "in good securities in the

"most profitable manner:" *Smyth v. Burne*, 25 Miss. 422. So a loan on a pledge of stock in a manufacturing corporation, the loan being for three fourths of the par value of the stock, and less than three fourths of its market value, was held to be a sound exercise of the trustee's discretion: *Lovell v. Minot*, 20 Pick. 116. An investment in bonds of a railway unsecured by mortgage, at eighty-five cents on the dollar, was held not to be proper, in *Allen v. Gaillard*, 1 S. C. 279. On the other hand, an investment at the same rate in the bonds of a railway company, which were secured by a first mortgage of its franchises and property, was sustained in *Brown v. French*, 125 Mass. 410; S. C., 28 Am. Rep. 254.

USING TRUST MONIES IN TRADE whether in the trustee's own business or in continuing that of the testator is in general a breach of trust where the instrument creating the trust does not authorize such an investment, although the *cestui que trust* has an election to claim the profits of the investment if he chooses: *Cock v. Goodfellow*, 10 Mod. 495; *Docker v. Somes*, 2 My. & K. 655; *Wedderburn v. Wedderburn*, 4 My. & C. 41; *Booth v. Booth*, 1 Beav. 125; *Kirkman v. Booth*, 11 Id. 280; *Collinson v. Lister*, 20 Id. 356; *In re Thorp*, Davies, 290; *Kyle v. Barnett*, 17 Ala. 306; *Thompson v. Brown*, 4 Johns. Ch. 30; *Brown v. Rickets*, 8 Am. Dec. 567; *Spear v. Spear*, 9 Rich. Eq. 184. So where the money is invested in business for a tenant for life in the trust fund: *Ryder v. Sisson*, 7 R. I. 341. Nor does a power to lend the fund on private or personal security authorize the trustee to employ it in his own business: *Westover v. Chapman*, 1 Coll. 177; *Flagg v. Ely*, 1 Edm. 206. It is said, however, in *Lathrop v. Smalley*, 23 N. J. Eq. 192, that it is not necessarily a breach of trust so as to authorize the removal of a trustee, for him to use the trust fund in his own business if it is not hazardous in its nature and he is a man of large means, and the money is in no danger. It is, in general, an executor's duty to wind up the testator's business as soon as it can be done conveniently, if the will does not direct otherwise: *Booth v. Booth*, 1 Beav. 129; *Kirkman v. Booth*, 11 Id. 280; *Collinson v. Lister*, 20 Id. 356. But he may no doubt continue it upon the request of all the parties interested: *Pool v. Munday*, 103 Mass. 174.

TRUSTEE CAN NOT DEAL WITH TRUST FUNDS FOR HIS OWN BENEFIT or that of a co-trustee. If he lends to his own debtor on personal security, and thereby obtains his debt, he will be liable for a loss, although he was authorized to lend on personal security: *Mulligan v. Wallace*, 3 Rich. Eq. 111. So if he lends to a co-trustee: *Stickney v. Sewell*, 1 My. & C. 8; or to a firm of which one of the trustees is a member: *French v. Hobson*, 9 Ves. 103; except where the instrument creating the trust authorizes such loan: *Paddon v. Richardson*, 7 De G. M. & G. 563; or invests in stock belonging in whole or in part to one of them: *Ackerman v. Emott*, 4 Barb. 626. If he invests the fund in his own name, the *cestui que trust* may hold him liable for a breach of trust: *Morris v. Wallace*, 3 Pa. St. 319; *De Jarnette v. De Jarnette*, 41 Ala. 708.

DIRECTIONS AS TO INVESTMENT OF TRUST FUNDS CONTAINED IN WILL or other instrument creating a trust must in general be obeyed in order to protect the trustee from liability: *Pride v. Fooks*, 2 Beav. 430; *Watts v. Girdlestone*, 6 Id. 188; *Collis v. Collis*, 2 Sim. 365; *Mills v. Osborne*, 7 Id. 30; *Ex parte Northern Railway Co.*, L. R., 9 Eq. 274; *Burrill v. Shell*, 2 Barb. 457; *Ihmsen's Appeal*, 43 Pa. St. 431; *Womack v. Austin*, 1 S. C. 421; *Sanders v. Rogers*, Id. 452; *Banister v. McKenzie*, 6 Munf. 447. An authority to invest upon different security from that which would be required, if there were no such authority, must be strictly pursued in order to protect the trustee:

Fowler v. Reynal, 3 Mac. & G. 500; *Cummins v. Cummins*, 3 Jones & La T. 64; S. C., 8 Ired. Eq. 723. If the investment is authorized to be made upon consultation with the *cestui que trust*, and the trustee makes it without such consultation, he does so at his own risk: *Mayer v. Mordecai*, 1 S. C. 383; S. C., 7 Am. Rep. 26. Where trustees under a marriage settlement are empowered to loan the trust fund to the husband upon specified security with the wife's consent manifested in a particular way, they have no authority to make a loan to the husband except upon strict compliance with the prescribed conditions: *Greenwood v. Wakeford*, 1 Beav. 576; *Kellarway v. Johnson*, 5 Id. 319; *Cocker v. Quayle*, 1 Russ. & My. 535; *Hopkins v. Myall*, 2 Id. 86; *Wiles v. Gresham*, 2 Drew, 258; *Bateman v. Davis*, 3 Madd. 98; *Child v. Child*, 20 Beav. 50. A power to invest "upon the security of the funds" of a corporation does not authorize an investment in preference shares of the corporation, for this is not a security upon its funds: *Harris v. Harris*, 29 Beav. 107. And a power to invest "upon the security by way of mortgage, of any freehold," etc., does not authorize an investment in railway mortgages and debentures: *Mortimore v. Mortimore*, 4 De G. & J. 472. Where a trustee is given a discretion as to the investment, the discretion is such as a prudent man would exercise in making a like investment for beneficiaries chosen by himself: *Roosevelt v. Roosevelt*, 6 Abb. (N. C.) 447. Therefore where a trustee is authorized to invest "in any property, real or personal, that he may see fit," it will not warrant an investment in property producing no present income and having only a prospective value, as stock in an unfinished factory: *Pray's Appeals*, 34 Pa. St. 100. It is laid down in *Ward v. Kitchen*, 30 N. J. Eq. 31, that a direction to invest "in productive funds upon good securities," authorizes investment only in securities recognized by the courts as legitimate, and that an investment in bank stock can not be made thereunder.

If the instrument creating the trust directs the investment of trust funds to be made in particular securities, or in a particular manner, a different investment can not be ordered, even by the court, without the consent of the *cestuis que trust*: *Wood v. Wood*, 28 Am. Dec. 451; *Burrill v. Sheil*, 2 Barb. 457; *Clark v. St. Louis etc. R. R. Co.*, 58 How. Pr. 21. But it seems that the court may order a fund directed by will to be invested by a testamentary guardian in lands in another state, to be invested upon the same trusts in lands within the state, where it is for the ward's benefit: *Wood v. Wood*, 28 Am. Dec. 451. In Pennsylvania it has been decided that where funds are directed by will to be invested "in some good, secure, and profitable stocks or other securities," they must be so invested, to protect the trustee, or he must make the investment in securities designated by law under the order of the orphans' court, as provided by statute: *Ihmsen's Appeal*, 43 Pa. St. 431. Of course, where the stock in which a trustee is directed to invest becomes valueless, or the investment becomes, for any other reason, impracticable, the court, on application, may order the investment to be made in other safe securities: *McIntire v. Oliver*, 17 Ohio St. 352.

LIABILITY FOR NOT CHANGING INVESTMENT MADE BY CREATOR OF TRUST. The better opinion is that a trustee, who, for an unreasonable time, leaves funds invested by a testator in securities in which the trustee himself would not have been authorized to invest, will be liable for any loss accruing therefrom, in the same manner as if he had made the improper investment himself: 1 Perry on Trusts, sec. 465; *Powell v. Evans*, 5 Ves. 839; *Will's Appeal*, 22 Pa. St. 325; *Lacey v. Davis*, 4 Redf. 402; *Ward v. Kitchen*, 30 N. J. Eq. 31; *Lacy v. Stamper*, 27 Gratt. 42. Although this is denied in 13 Am. L. Reg. (N. S.) 208, and a number of cases are cited to show that a trustee is

not always held liable for a loss arising from an insecure investment by the testator, which such trustee has omitted to change: *Dorchester v. Evingham*, Taml. 279; *Buxton v. Buxton*, 1 My. & C. 80; *Rowth v. Howell*, 3 Ves. jun. 565. It is no doubt a necessary element of the rule holding a trustee liable for a loss of funds insecurely invested by the testator, that he must himself have been guilty of negligence in the matter by leaving the funds so invested for an unreasonable time. In *Konigsmacher v. Kimmel*, 21 Am. Dec. 374, it is held that a trustee is liable only for gross negligence with respect to a fund which he has never received, and that he is not bound to sue for the money instantly, if it is apparently safe. See also *Swoyer's Appeal*, 5 Pa. St. 383, and *Commonwealth v. McAlister*, 28 Id. 485, approving what is said in the principal case as to the liability of a trustee being more stringent where the fund has actually come to his hands than where it has not. It is certain that where the trustee has a discretion in the matter, and acts with due prudence, in not changing the investment, and especially where the investment is one which he himself would have been authorized to make, he will not be liable for a loss: *Hogan v. De Peyster*, 20 Barb. 100; *Barton's Estate*, 1 Pars. Eq. 24; *Bouker v. Pierce*, 130 Mass. 262; *Band v. Fardell*, 7 De G. M. & G. 628.

ASSENT TO IMPROPER INVESTMENT BY CESTUI QUE TRUST who is *sui juris*, with full knowledge of the facts, will estop him from holding the trustee accountable: *Walker v. Simonds*, 3 Swanst. 64; *Terry v. Terry*, Finch, 273; *Allen v. Hancom*, 7 Bro. Ch. 375; *Langford v. Gascoyne*, 11 Ves. 333; *Brice v. Stokes*, Id. 319; *Farrar v. Barraclough*, 2 Sm. & G. 231; *Booth v. Booth*, 1 Beav. 125; *Blackwood v. Burrowes*, 2 Conn. & L. 459; *Wood v. Wood*, 28 Am. Dec. 451; *Campbell v. Campbell*, 38 Ga. 304; *King v. Talbot*, 40 N. Y. 76. But such assent must be with full knowledge of the facts and of their legal effect: *Munch v. Cockerell*, 15 My. & C. 178; *Adair v. Brimmer*, 74 N. Y. 539. The consent of a spendthrift to an unauthorized improvident investment by his guardian will not exonerate the latter: *Harding v. Larned*, 4 Allen, 426. So the consent of an infant, or *feme covert*, is unavailing: *Murray v. Feinour*, 2 Md. Ch. 418; *Pray's Appeals*, 34 Pa. St. 100. But even a married woman may bar herself from complaining of an improper investment of her separate estate by assenting thereto, being regarded in equity as a *feme sole* as to such estate: *Brewer v. Swirles*, 2 Sm. & G. 219; *Sherman v. Parish*, 53 N. Y. 483. But in South Carolina it is held that, before the constitution of 1868, a married woman could not by her consent, not provided for in the settlement, validate a loan from her separate estate to her husband so as to protect the trustee: *Dunn v. Dunn*, 1 S. C. 350. The assent of one who has a mere life interest, to an improper investment of a trust fund, will not justify it except so far as his own interest is concerned: *Ryder v. Sisson*, 7 R. I. 341. Something more than mere failure to complain of an investment is required, to constitute a binding assent to it: *Phillipson v. Gatty*, 7 Hare, 516. The receipt of dividends from bank stock by a *cestui que trust* will not shield the trustee from liability for investing in it: *Hemphill's Appeal*, 18 Pa. St. 303.

THE PRINCIPAL CASE IS CITED in *Worrell's Appeal*, 9 Pa. St. 511, to the point that the Pennsylvania act of 1832 was not intended to restrict trustees to the mode of investment there specified, but simply to point out a course free from risk. In *Hemphill's Appeal*, 18 Id. 305, it is cited as showing that the Pennsylvania courts had not, at that time, pronounced either for or against the English rule of trust investments above referred to. In that case, however, the English rule was, as we have already seen, definitively adopted.

CLIPPINGER v. HEPBAUGH.

[5 WATTS AND SHERMAN, 315.]

AGREEMENT TO PAY FOR SERVICES IN PROCURING PASSAGE OF PRIVATE ACT of the legislature for a party's benefit, is void as against public policy.

ACTION on an agreement entered into by the defendant to pay the plaintiff the sum of one hundred dollars, on condition that the plaintiff should succeed in procuring the passage of an act of the legislature authorizing the defendant and his wife to sell certain land which had been devised to the wife for life, with remainder in fee to her children, and to invest the money in their discretion for the children's benefit. The plaintiff drew up the petition for the act, and also the bill, and spent much time in going before the judiciary committee to explain the bill. The act was finally passed, and the defendant had sold the land in accordance with it. The court below being of opinion that the plaintiff was entitled to recover, gave judgment for him, and the defendant brought error.

Reed, for the plaintiff in error.

Biddle, *contra*.

By Court, ROGERS, J. The practice which has generally obtained in this state, to allow a contingent compensation for legal services, has been a subject of regret, nor am I aware of any direct decision by which the practice has received judicial sanction in our courts. But conceding the principle to be as is assumed, it is very certain that it has not yet been extended to the allowance of a compensation for services in our legislative halls. The point, therefore, comes before us, untrammelled either by inveterate practice or authoritative decisions. Such services, be it remembered, are not confined to the legal profession. They are common to every class of citizens, and if we should give countenance and a legal sanction to this attempt, which is the entering wedge, it is impossible to foretell the train of evils of which it may be the prolific parent. Already is there too much reason to believe that this indispensable branch of government, without which our whole political fabric would crumble into ruins, has in some instances been contaminated by sinister and improper influences brought to bear on members, and no doubt having their source in the direct and indirect efforts of individuals retained under the hope of reward in the event of success. It can not be avoided that such influences, privately and secretly exerted under false and covert pretenses, must operate deleteri-

ously on legislative action; and of this truth, unfortunately, our annals (I do not speak of this state alone) have afforded some melancholy proofs. There is at least a wide-spread and growing suspicion of legislative integrity, which of itself is an evil of no little magnitude. Its pernicious tendency seems to be admitted as to public bills, but a distinction is taken between them and private acts. That the latter may not prove so pernicious as the former (of which, by the by, I am by no means satisfied), may be conceded without danger to the argument; but the principle, with which alone we have to do, is the same. When it is recollected that, with the rapid increase of wealth and population, such acts have greatly multiplied, and have assumed an importance before unknown; and when it is remembered (with all due respect be it spoken) that comparatively so little care is taken in the preparation of private bills, or in giving notice to persons interested in the examination of the evidence on which they are founded, that the information of members is derived, altogether or in part, from the applicant himself, and the secret whisperings of his friends; we can not be too much on our guard against them, nor insist too strongly on the necessity of preserving, as far as can be done, the source from which the evidence on which they act is obtained. It would not be becoming in us to lend our aid in a transaction which may be founded in corruption, and steeped in fraud.

These remarks are not to be understood as having any relation to the case in hand, for no suspicion is entertained that anything out of the ordinary course took place in respect to this bill. Yet it can not escape observation that even here an inducement was not wanting to an improper, or at least personal influence, or deceptive acts, to procure the success of the measure. The temptation may be small here, but it has not always been confined within such narrow limits, as there is great reason to fear. We do not say, it is not necessary to the case to say, that a certain compensation for such services may not be recovered; but we are clearly of opinion that it would be against sound policy to sanction a practice which may lead to secret, improper, and corrupt tampering with legislative action. It is not required that it tends to corruption: if its effect is to mislead, it is decisive against the claim; and that such is its tendency, no human being can reasonably doubt. In *Hatzfield v. Gulden*, 7 Watts, 152 [32 Am. Dec. 750], it is decided that a contract, founded on a promise and agreement to procure signatures and obtain a pardon from the governor, is unlawful,

and can not be enforced by action. This case is very pertinent, for if it is essential to the purity of the government to protect the governor from imposition in the exercise of the executive functions, it is equally so to extend the same protection to the members of the legislature. It is of the first consequence that they should not be deceived, that they should be protected from the arts and misrepresentations of designing men, having an interest to mislead them from the paths of duty.

It is therefore most erroneous to assume, as is done by the plaintiff's counsel, that a practice, leading to such consequences, is not contrary to private interest and public morals. The reverse is too true; for already has a class of persons arisen, at the seat of the general government and elsewhere, who make it a business to push through private claims, for a compensation greatly, if not entirely dependent on success. How demoralizing this may be, it needs not the gift of prophecy to foretell. Nay, more; we feel its effects, for it is impossible to shut our eyes at the consequences of this, with other causes, daily developing themselves in the decline of justice and public morals. How easy the transition from private individuals to the members themselves, it would not be difficult to divine; but we are not left to conjecture, for we are not without examples, which it would be invidious to mention, but which are too well known. Whatever abuses may exist elsewhere, we hope the judicial tribunals of the country may be kept pure, without suspicion even, that they may never be induced under a pretense to countenance vice, or lend their sanction to a principle, the inevitable effect of which will be to increase, if it does not create, fraud and misrepresentation. In the face of many painful examples to the contrary, it is idle to say that individual extraneous influence, acting secretly upon the members of the legislature, is not pernicious to the best interests of society. Its direct tendency is to sap the foundations of all morality. And we are not without authority in a sister state: *Wood v. McCann*, 6 Dana, 366, where this point has been considered. The court, it is true, decided in favor of the plaintiff; but it was on the special grounds, that it did not appear that the fee was contingent, nor that the plaintiff was expected or required to do anything he might not lawfully have done, or that he had any personal or pecuniary interest in the success of the application to the legislature.

The whole reasoning of the court, however, goes to establish these propositions, which can not be reasonably denied. That

the law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil, or political institutions of a state. That a contract to procure or endeavor to procure the passage of an act of the legislature, by any sinister means, or even by using personal influence with the members, would be void, as being inconsistent with public policy and the integrity of our political institutions. And any agreement for a contingent fee, to be paid on the passage of a legislative act, would be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influences to effect the object. These are broad fundamental principles, to the truth of which we subscribe, and which cover the whole ground on which this case rests. It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence over an important branch of the government. It may not corrupt all; but if it corrupts, or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal.

Two cases have been cited, adverse, as is supposed, to this view of the case: *The Vauxhall Bridge Co. v. Earl Spencer*, 4 Cond. Eng. Ch. 28; S. C., Jacob, 64; *Edwards v. Grand Junction R. Co.*, 10 Id. 85; S. C., 7 Sim. 337. In the first, it is ruled that securities given to persons who would be prejudiced by the passage of a private bill in parliament, in consideration of their withdrawing their opposition to it, are not illegal. In the last that an agreement not to oppose a railway is not illegal. The projectors of a railway, pending a bill in parliament for incorporating them, having made an agreement on behalf of the proposed corporation in consequence of which a threatened opposition to the bill was withdrawn, it was held that the corporation, having received the benefit of the agreement, was bound by it. The last case was ruled on the authority of the first; and if it was the case of a secret agreement, withheld from the knowledge of the committee to whom the subject was committed, I can not say that I am altogether satisfied with the decision. Nor do I see much force in the observation, that because only one member may have been dissatisfied with the bill, *non constat* it would

have had any influence on the house. But, be this as it may, it is put upon special grounds, that it was merely an agreement to compensate the opposing party for what it was apprehended they might lose by the passage of the act; and if it were a private affair merely, in which the public had no interest, it might be well enough. Reliance was also had, as it seems, on a practice which obtains in parliament, of passing such bills when the parties can agree about them. The chancellor seems to have thought that it was a matter in which the public had no interest, that it was neither against sound morality nor public policy. And if he is right in these positions, his conclusions can not be gainsaid. But in this radical distinction consists the difference of the cases.

Besides, it would be unsafe to rely on a precedent coming from such a source, when we reflect upon the different manner of conducting such business in the respective countries. The contrast is indeed striking. In England a private act of parliament is in the nature of a common assurance, and the passage of such an act is conducted in some measure with the forms and circumspection of a judicial proceeding. In this state, it is notoriously otherwise. In both houses, in England, they are carried on with great deliberation and caution, particularly in the house of lords; they are usually referred to two judges, to examine and report the facts alleged, and to settle all technical forms. Nothing is done without the consent, expressly given, of all parties in being, and capable of consent, that have the remotest interest in the matter, unless such consent shall appear to be perversely, and without reason, withheld. An equivalent in money or other estate, is usually settled upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by the act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever, except those whose consent is so given and purchased, and who are therein particularly named. And yet, notwithstanding all the precautions used, alarm has been felt at the frequency of acts of parliament of a private nature, lest the good old rules which are the best security for property should be shaken; and wishes have been expressed from the highest quarter, that men might not have too much reason to fear that the settlements which they make of their estates, shall be too easily unsettled, when they are dead, by the power of parliament.

If there is reason to fear this in England, how much more so

in this state, where but little precaution is used—where, not unfrequently, such acts are passed with but little examination, on the private representations of persons who have a direct interest to misrepresent and deceive. And of the danger to property arising from this source, this case presents a proof; for it is certain that this act, and others that might be named, so loosely drawn, containing so little security for the rights of infants, would not have passed the parliament of England, nor the legislature of this state, if properly conned and scrutinized, without the assent or even hearing of the parties principally to be affected by it. I say without the hearing of the infants, for I count but little the assent of the parent who had an interest adverse to them. It is remarkable, too, that the bill passed without any saving clause, which, although not absolutely necessary, yet would have shown some regard to the rights of persons who were not in a capacity to protect themselves.

Judgment reversed, and judgment for defendant.

AGREEMENT, IN CONSIDERATION OF WITHDRAWING OPPOSITION TO PASSAGE OF ACT of the legislature, to grant certain privileges, is void as against public policy: *Pingry v. Washburn*, 15 Am. Dec. 676. In *Frost v. Belmont*, 6 Allen, 152, it is held, approving *Clippinger v. Hepbaugh*, that services rendered in procuring the passage of an act by means of secret attempts to secure votes, or personal or sinister influence upon members, is not a legal consideration for a contract. So in *Marshall v. Baltimore etc. R. R.-Co.*, 16 How. (U. S.) 314, 336. And in *Trist v. Child*, 21 Wall. 441, 445, it is decided, also citing the principal case, that an agreement to take charge of a claim before congress, and to prosecute it as agent or attorney for the claimant, by lobby service, is void, but that a contract for purely professional services, such as drafting a petition for an act, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them to the committee, or other proper authority, etc., are valid.

CONTRACTS DEEMED VOID AS AGAINST PUBLIC POLICY, GENERALLY.—Agreements for suppression of criminal prosecution: *Town of Hinesburgh v. Sumner*, 31 Am. Dec. 599, and note, discussing the subject at length; *Dizon v. Olmstead*, Id. 629, and note; *Shaw v. Spooner*, 32 Id. 343, and note; *Woodruff v. Hinman*, 34 Id. 712; *Ward v. Allen*, 35 Id. 387; for procuring a pardon: *Hatzfield v. Gulden*, 32 Id. 750; for procuring official appointment: *Faurie v. Morin*, 6 Id. 70; *Filson's Trustees v. Himes*, 5 Pa. St. 456, citing the principal case; to prevent competition for a government contract: *Gulick v. Ward*, 18 Am. Dec. 339; for services at an election: *Swayze v. Hull*, 14 Id. 399; for the sale of an office: *Outon v. Rodes*, 13 Id. 193; *Salling v. Mc Kinney*, 19 Id. 722; *Groton v. Waldoborough*, 26 Id. 530; to indemnify an officer for permitting an escape: *Ayers v. Hutchins*, 3 Id. 232; *Webber's Executors v. Blunt*, 32 Id. 445; to procure the performance of an official duty: *Mitchell v. Vance*, 17 Id. 96. As to other instances of such contracts, see *Jones v. Caswell*, 2 Id. 134; *Nichols v. Ruggles*, 3 Id. 262; *Yeomans v. Chatterton*, 6 Id. 277; *Rogers v. Waller*, 9 Id. 758; *Myers v. Hodges*, 27 Id. 319; *Green v. Hollingsworth*, 30 Id. 680. A contract to procure a discharge from

the war department for a soldier in the United States service, whether the fee is contingent or fixed, is held, in *Bowman v. Coffroth*, 59 Pa. St. 23, to be void as against public policy, and the principal case is referred to as intimating that the doctrine applies only where the fee is contingent, but the court say that there is no reasonable distinction in that respect between fixed and contingent fees. It is the nature of the service, and not the fee, that renders the contract void. So in *Buck v. First Nat. Bank*, 27 Mich. 302, that a note given to procure a party to sign a petition for executive clemency is void; and the general doctrine is laid down upon the authority of *Clippinger v. Hepbaugh*, and other cases, that any promise to pay money for signing a petition to the legislative or executive department of the government, or for the employment of solicitations to influence or secure official action in any form whatever, other than by the use of open and legitimate evidence or argument, is entirely without consideration, and against public policy.

SEIBERT v. PRICE.

[5 WATTS & SERGEANT, 438.]

PROBABLE CAUSE, IN ACTION FOR MALICIOUS PROSECUTION, amounting to a justification, exists where the defendant had a reasonable belief that the plaintiff committed the crime charged, whether the belief was well founded or not.

SENDING OUT WITH JURY, IN ACTION FOR MALICIOUS PROSECUTION, DEFENDANT'S AFFIDAVIT before the magistrate, in instituting the prosecution complained of, is not error.

ACTION for a malicious prosecution for perjury. The charge of perjury grew out of certain testimony of the plaintiff on an inquisition of lunacy. The defendant made an affidavit before a magistrate, charging the plaintiff with having falsely sworn on that occasion that the alleged lunatic had been a witness for the defendant in an action previously brought against him by one Schoch. The court below charged the jury, that if they believed from the evidence that the plaintiff did so testify, and that his testimony, in that particular, was false, there was probable cause for the prosecution instituted by the defendant; otherwise not. The court also, on the application of the plaintiff, against the defendant's objection, sent out with the jury the affidavit made by the defendant before the magistrate. Verdict and judgment for the plaintiff, and the defendant brought error, on exceptions to the instructions and to the action of the court with respect to the affidavit.

Weidman, for the plaintiff in error.

Sanderson and Pearson, contra.

By Court, GIBSON, C. J. The judge put the question of probable cause upon the fact of what the plaintiff had actually sworn

before the inquest, and not on the fact of what he was supposed to have sworn. It was a matter of much doubt, at the trial of the present cause, whether he had said that the alleged lunatic had been called as a witness in *Schoch v. Seibert*, by the defendant, or not; insomuch, that the witnesses who swore positively about it were divided, even insomuch that a majority were in favor of the affirmative. In this conflict of perception, then, suppose that the prosecutor had acted on a mistaken belief that the plaintiff had sworn what would undoubtedly have been a perjury, would he not have acted on what appeared to have been justifiable cause; and if he did so act, would it not repel the implication of malice?

Again, if the same misapprehension was entertained by the by-standers, would it not materially increase, in an indifferent mind, the probability of the witness' guilt? What is justifiable probable cause in the technical sense? It is a deceptive appearance of guilt arising from facts and circumstances misapprehended or misunderstood so far as to produce belief; and when the subject of belief is the crime of perjury, the misapprehension may have regard to the extent of the swearing, as well as the truth of it. The question of probable cause may as well depend on the one as on the other, the difference being, that a misapprehension or doubt is more likely to occur in regard to the former than the latter. Still, the tenor of the testimony, resting as it does in the understanding and memory of the hearers, who may have misapprehended or forgotten it, may not be accurately perceived by the prosecutor; for the uncertainty of human perception is well known to those who are familiar with the examination of facts depending on oral proof. No two eye-witnesses ever yet exactly agreed in their account of a transaction; and nothing is more frequent than the misapprehension of a person's words. A by-stander, relying on his own ears, may be grossly mistaken; and when the matter has regard to the sum of a witness' testimony, instead of the truth of it, there may be such a mistake as to produce an appearance of perjury sufficient to justify a prosecution of it? If, then, there was a reasonable belief in the minds of the prosecutor and the by-standers, that the plaintiff swore to what it is admitted would have been an untruth, whether the belief was well founded or not, there was probable cause, amounting to justification.

The exception to the sending out of the prosecutor's affidavit before the magistrate, is not sustained. That document was not a deposition, but an indispensable part of the case put in

evidence by the plaintiff himself; and, as such, it does not fall within the rule which excludes a deposition from the jury room.

Judgment reversed, and a *venire de novo* awarded.

PROBABLE CAUSE IN ACTIONS FOR MALICIOUS PROSECUTION, what is, and evidence of: See *Stone v. Stevens*, 30 Am. Dec. 611, and note citing previous cases in this series: *Griffin v. Sellars*, 31 Id. 422; *Hickman v. Griffin*, 34 Id. 124, and note; *Maloney v. Doane*, 35 Id. 204; *Yocum v. Polly*, 36 Id. 583; *Grant v. Deuel*, 38 Id. 228. In *Hickman v. Griffin*, 34 Id. 124, it is held that the real inquiry in an action for malicious prosecution is, whether there was probable cause for the prosecution, not the knowledge or belief of the party prosecuting, as to its existence. Probable cause is a mixed question of law and fact: *Nash v. Orr*, 5 Id. 547; *Legget v. Blount*, 7 Id. 702; *Ulmer v. Leland*, 10 Id. 48; *Plummer v. Gheen*, 14 Id. 572; *Miller v. Brown*, 23 Id. 693; *French v. Smith*, 24 Id. 616.

MIFFLIN v. COMMONWEALTH.

[5 WATTS AND SERGEANT, 461.]

CONSPIRACY TO DO AN ACT WHICH WOULD BE INNOCENT if done by an individual, may be indictable if the act amounts to a private wrong or a public mischief.

CONSPIRACY TO EFFECT ESCAPE OF FEMALE INFANT with a view to her marriage against her father's will is indictable.

INDICTMENT for conspiring to effect the escape of a female infant and effecting such escape, for the purpose of marrying her to one Reynolds. After a verdict of guilty at the quarter sessions the defendants moved in arrest of judgment on the ground that no crime was charged in the indictment. Motion overruled, and the indictment was removed into this court on error.

Biddle and Watts, for the plaintiffs in error.

Graham and Alexander, contra.

By Court, GIBSON, C. J. The law of conspiracy is certainly in a very unsettled state. The decisions have gone on no distinctive principle; nor are they always consistent. It is settled, however, that there are acts which, though innocent when done by an individual, are criminal when done in concert; but they are not very satisfactorily defined. Mr. Russell has attempted to arrange them under particular heads in his treatise on crimes, vol. 2, p. 553, two of which—confederacies to do a private wrong, and confederacies to do a public mischief—seem to comprise the case under consideration; for nothing can be more grievous to the party, or of worse example to the public, than to steal away a man's daughter from his nurture and admoni-

tion. But it is said by Mr. East, in his Pleas of the Crown, c. 11, sec. 9, that however grievous it may be, he has found no instance of an indictment for marrying an infant against the father's consent; and that the cases which contain *dicta* to the contrary do not warrant the assertion to a general extent. As regards the abstract principle, he is undoubtedly correct. *The King v. Moor*, 2 Mod. 130, where it was said that the taking away of a young maid, which is punishable by the 4 and 5 Phil. and Mary, c. 38, is an offense also, at the common law, is contradicted by *The King v. Marriot*, 4 Mod. 145. But though a clandestine or runaway marriage is not indictable at common law, where it has been procured by the unassisted artifice of the husband, the cases abundantly show it to be otherwise when it has been procured by confederacy. *The King v. Twistleton*, 1 Lev. 257; S. C., 1 Sid. 387, was an information against confederates, who had induced a daughter to elope from her father's house, and marry one of the defendants; and exceptions being taken to the information after conviction, all the judges agreed that the act was punishable by fine and imprisonment at the common law. *The King and Queen v. Thorp*, 5 Mod. 221, was also an information for conspiracy to seduce a son and heir under the age of eighteen, "and carry him out of the custody, counsel, and government of his father," with design to marry him to a woman of ill fame; and the court said: "It is a misfortune that the marriage is good; it is true it is lawful to marry, but if it is obtained by unlawful means, it is an offense. The question is whether a father has not the guardianship of his son and heir till the age of twenty-one, as he had it when there was tenure by knight's service; for the father has an original title vested in him by nature, that he might have an action against the lord *quare filium et heredem suum rapuit*." Surely he has the same natural title to the guardianship of his infant daughter. These two cases are in point, and uncontradicted.

That the law esteems the stealing of a daughter to be a public mischief, is further shown by *The King v. Pigot*, 12 Mod. 516, in which the defendant was convicted of a misdemeanor in forcibly attempting to carry away a Mrs. Hescot. "Surely," said Lord Holt, "this concerns all the people of England who would dispose of their children well." But other provisions of the law show the same thing. For the seduction of a daughter, an action lies ostensibly to compensate the loss of her service, but actually to punish her seducer, the pecuniary loss never being taken as the measure of the damages; and the father's ad-

monitory right to concern himself in the affair of his daughter's marriage, is protected by a statute indicative of the public tone, which imposes a penalty on a magistrate or minister for marrying a minor or an apprentice without the parent's or the master's consent. The penalty is indeed given to the party grieved, but evidently to correct the offender rather than to compensate the sufferer. Thus we see how sacred a thing, in the sight of the law, is a father's right to settle his daughter in marriage. And it is a right which is deeply seated, not only in the law of nature, but in the public welfare. The separation of the human race into families is universal; and the care of the offspring for moral culture, as well as preparation for settlement in the world, continues till the expiration of the time assigned by the law as the period of infancy. This natural institution is not only the root of all our virtue and happiness, but the foundation of every thing like government, whether patriarchal or political. "The laws of education," says Montesquieu (*Spirit of Laws*, vol. 1, b. 2, c. 5), "are the first impressions we receive; and as they prepare us for civil life, each particular family ought to be governed pursuant to the plan of the great family which comprehends them all." It would be difficult perhaps to construct a patriarchal government on the model of a federate democracy; but the argument that the moral government of the separate families which compose a nation, is the foundation of its municipal government, is not the less just. It proves, too, that parental authority, which is respected even by savages, is not to be contemned, without introducing disorder into civilized communities; and that the seduction of a daughter from her family allegiance is not a mere civil injury, which does not involve the welfare of society. Yet such is the argument on the part of the defendants, founded, for the most part, on *The King v. Turner*, 13 East, 231, which, to say the least of it, is an odd case. Confederates, armed with clubs to beat down opposition, entered a man's preserve in the night to take and carry away his hares; and Lord Ellenborough called this "an agreement to go and sport on another's ground;" in other words, "to commit a civil trespass!" It would be a curious thing to know what he would have called an agreement to steal a man's pigs, or to rob his hen-roost. In its mildest aspect, the entry into the preserve with bludgeons was a riot, which, it appears by a note in the second volume of Mr. Chitty's *Criminal Law*, page 506, may be a subject of conspiracy.

But whatever may be said of *The King v. Turner*, there are

certainly other cases of the same stamp. In *Rex v. Pywell*, 1 Stark. 402, a confederacy to cheat in the sale of a horse, was held to be innocent; and in *The State v. Luckey*, 4 Halst. 293, it was held that a civil injury, which is not indictable when committed by an individual, does not contract the quality of guilt by being the act of a confederacy. But the contrary was held in *The State v. Buchanan*, 5 Har. & J. 317 [9 Am. Dec. 534], and in *The King v. Stratton*, 1 Camp. 549, a confederacy to deprive the secretary of a trading company of his office was held not to be indictable, only because the company was illegal. These discrepancies show the want of a test for doubtful cases; but there are cases of such transcendental wrong and outrage, as leave no doubt of their character; and a confederacy to steal a daughter is not the least of them. It is a denial or contempt of the father's right to counsel and advise; and it is only less atrocious than the conspiracy in *The King v. Grey*, 3 St. Tr. 519, and that in *The King v. Delaval*, 3 Burr. 1437, to ruin a virgin by enticing her to desert her father's protection and live in a state of concubinage. A marriage at twelve, which is valid for the sake of the issue, would be scarce less brutal or offensive to the feelings of the family; and why, but to protect the feelings of relatives, was a combination to take up dead bodies, for scientific purposes, which is not essentially immoral, held to be indictable in *Rex v. Lynn*? 2 T. R. 733. But if it would be indictable to procure the elopement of a girl who had just attained the age of consent, at what other age within the period of infancy would such an act be innocent; and how would the law discriminate? It is true that Mr. Justice Buller was of opinion in *Rex v. Fowler*, 2 East's P. C., c. 11, sec. 11, that as the act of marriage is lawful in itself, a combination to procure it can become criminal only by the use of undue means; but the parties, in that case, were *sui juris*, and he left the question, what is undue means, an open one. If the subject of the present indictment is no more than a private wrong, it must pass entirely without rebuke; for it would be easier to find a precedent for a criminal corrective of it, than a civil one. But even a private injury, such as hissing an actor, or impoverishing a man, becomes a public wrong when done in concert; and this was certainly so.

Even had the precedents not reached the case before us, there would be no reason why the law of conspiracy should stop short of it now, considering the smallness of the point from which it started and the degree of its subsequent expansion. In Lord

Coke's day it was limited to "a consultation and agreement between two or more, to appeal or indict a person falsely and maliciously:" 3 Inst. 143; since when, it has spread itself over the whole surface of mischievous combination. I am not one of those who fear that the catalogue of crimes will be unduly enlarged by its progress, seeing, as I do, that it is never invoked except as a corrective of disorder which would else be without one, and as a curb to the immoderate power to do mischief, which is gained by a combination of the means. It is true, that there is no recent precedent of an indictment like the present; but had not 3 Hen. VII., c. 2, and 39 Eliz., c. 9, provided a more energetic remedy for the offense, common law precedents of indictments for it would have abounded. But were we without even the semblance of a precedent, we could not hesitate to pronounce the act of which the defendants have been convicted, a common law offense.

Judgment affirmed.

CONSPIRACY, WHAT CONSTITUTES IN GENERAL: See *State v. Buchanan*, 9 Am. Dec. 534; *Commonwealth v. Judd*, 3 Id. 54; *State v. Younger*, 17 Id. 571; *People v. Mather*, 21 Id. 122, and note; *State v. De Witt*, 27 Id. 371; *People v. Fisher*, 28 Id. 501, and note; *Commonwealth v. Hunt*, 38 Id. 346. The principal case is cited to the point that a combination to do an act which would be innocent if done without such combination, may be an indictable conspiracy, in *Twitchell v. Commonwealth*, 9 Pa. St. 212, and *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Id. 187. In the latter case, a combination of coal companies to fix a standard of prices was held a criminal conspiracy, and the rule was laid down that a combination is criminal, whenever the act to be done necessarily tends to prejudice the public or to oppress individuals by subjecting them to the power of such confederacy.

PARENT'S REMEDY FOR ENTICING AWAY CHILD: See *Vaughan v. Rhodes*, 13 Am. Dec. 713, and note; *Jones v. Tevis*, 14 Id. 98; *Wodell v. Coggeshall*, 25 Id. 391.

REED v. BUCKLEY.

[5 WATTS AND SERGEANT, 517.]

VESTED LEGACY is given where a testator, after providing for the sale of his estate, directs as follows: "The net proceeds of my estate, heretofore ordered by me to be disposed of, shall be equally divided between my remaining children, share and share alike, and at the times of their severally arriving at the age of twenty-one years;" and the husband and administrator of a daughter who dies under age, without issue, is entitled to her share.

WORD "HEIRS" MEANS LEGAL REPRESENTATIVES, AND MAKES LEGACY VESTED in cases where it would otherwise be contingent.

ACTION by the plaintiff, surviving husband and administrator of Matilda Reed, who died within the age of twenty-one, without issue, to recover from the defendants, executors of the will of the father of the said Matilda, a share of his estate, given her by the will. The facts material to the point decided, appear from the opinion. Judgment for the defendants, on the ground that the legacy in question was contingent. The plaintiff brought error.

Miller, for the plaintiff in error.

Anthony, contra.

By Court, SERGEANT, J. Among the numerous cases that have occurred on the subject of vested and contingent legacies, none has been cited that exactly resembles the present: and in order to decide it, we must rely on the application of those general principles of law, which courts have recognized. The rule borrowed from the civil law has been the ordinary guide in the first instance, that where the contingency is annexed to the time of payment only, and the legacy has been given by a previous bequest, there it is vested; but if the contingency is annexed to the legacy, it does not vest unless the contingency happens. In the case before us, if we are to determine it by this rule, we are encountered by the two opposite constructions of which the item in the will is susceptible. "Also, I direct, that the net proceeds of my estate heretofore ordered by me to be disposed of, shall be equally divided between my remaining children share and share alike, and at the times of their severally arriving at the age of twenty-one years." If we fill up the ellipsis after the word "and" by the word "paid," it will make the sense clear—that is to say, the proceeds, whenever the estate shall be sold (which he had previously ordered to be within five years), shall be divided into as many shares as there are remaining children, and be paid over to them respectively, from time to time, as they came of age. To enable the executor to do this, the testator had previously provided that the proceeds of the real estate should be secured in the usual mode, that is, it is presumed, by notes or bonds capable of being turned into money, or passed over in payment to the legatees. But, if we adopt the other alternative suggested, of striking out the word "and," the bequest is involved in the incongruity of dividing the whole proceeds off to the children, share and share alike, as they come of age, which can not be; because division, properly speaking, is one act, whereas the children come of age successively for

several years. It seems reasonable, therefore, to say, that there was to be one division, and that was when the proceeds were received and invested; but there were to be several payments, namely, to each child as it came of age. If so, then according to the settled rule, the legacy was vested; it was payable at all events, but the time of payment only was contingent, and on the death of a child before twenty-one, such vested legacy went to its legal representatives.

This appears to be the most reasonable construction, and it is strongly fortified by a reference to the clause in the will immediately succeeding, by which the residuary interest after the decease of the testator's wife is disposed of. "And at the decease of my dear wife, that part of my estate set apart for her use, shall then be divided amongst my surviving children, or their heirs, as last above directed." Here it is clear that by the decease of one of his children, before the death of his wife, the legacy would not lapse: it being decided, that the word "heirs" means legal representatives, and that its effect is to make the legacy vested, in cases where it would otherwise be contingent: *Patterson v. Hawthorn*, 12 Serg. & R. 112; *King v. King*, 1 Watts & S. 206 [37 Am. Dec. 459]. The understanding of the testator would seem to be, that both clauses in this respect were alike: and such intention would have a paramount influence in interpreting an ambiguous bequest in the same will, it being a settled rule in the construction of wills, as well as of deeds and other instruments, that the whole is to be taken together, and the design is to be gathered from a comparison of the various provisions and clauses.

It can make no difference in the construction of wills, that by the chapter of accidents, the legatee is a daughter, who has married under twenty-one, and died without issue, and thus the bequest goes to the use of her husband, who is a stranger to the blood of the testator. Such an event, no doubt, creates a feeling against the claim, in those of the family stock. But suppose, as happens in many other cases, the daughter leaves issue; by the rule which is contended for, the issue would be deprived of the bounty of its grandfather, and its share would be taken by those already provided for. This would be as obnoxious to our feelings, as it is evidently repugnant to the intentions of testators. Marriage is itself, in law, a high and valuable consideration: and independent of this, a husband is often a meritorious claimant. We are of opinion, that the legacy vested in George Reed, the administrator, as fully as it would in his wife if living

after twenty-one. In this opinion this court does not decide on the questions stated in the case, as to the rights of any persons whatever in the sum payable after the death of the widow. These rights must be left to be settled hereafter, when the claims shall arise.

Decree reversed, and record remitted to the court of common pleas of Lycoming county to appoint an auditor to ascertain the amount due according to agreement of parties, and enter judgment thereon.

VESTED LEGACY, WILL GIVES, WHEN: See *King v. King*, 37 Am. Dec. 459, and the note thereto, in which are collected the previous cases in this series on that subject. In *Buckley v. Reed*, 15 Pa. St. 86, the principal case came again before the court for a construction of that part of the testator's will respecting the division of that part of the estate given to the wife, among the children after the wife's decease, and what is said in the foregoing opinion on that point was approved. In *Provencher's Appeal*, 67 Pa. St. 469, both decisions in *Reed v. Buckley* are cited as following *Patterson v. Hawthorn*, 12 Serg. & R. 112, on the point that where a distinct bequest is given to a widow for life with a division of the principal among the testator's children or "heirs" at her death, the legacy to them is vested. In *Sebastian's Estate*, 4 Phila. 243, and *Seibert's Appeal*, 13 Pa. St. 504, it is held, citing the principal case, that to determine whether a legacy payable on the happening of a future event is vested or contingent, regard must be had to the point whether the time is annexed to the gift or to the payment, and that if the legacy is payable at all events, the time of payment only being contingent, the legacy is vested. In the case last cited the legacy was held contingent, distinguishing *Reed v. Buckley*. In *McGill's Appeal*, 61 Pa. St. 50, the principal case is cited to the point that the words "or their heirs" import a limitation to whoever may legally represent a deceased legatee, and if the legacy is undisposed of, it passes as his property in administration at the time at which it would have passed into his actual possession if he had lived, and the legacy is vested.

BARING v. PEIRCE.

[5 WATTS AND SHERGENT, 543.]

AUTHORITY OF SPECIAL AGENT MUST BE STRICTLY PURSUED to bind the principal, and those dealing with him must look to his powers.

PAROL CONTRACT FOR SALE OF LAND BY AGENT of the owner, and his admission of the purchaser into possession, are unauthorized, and do not take the case out of the statute of frauds, nor furnish a defense to an action of trespass by the owner, where the agent is acting under a special authority requiring him to enter into written contracts for the sale of the land.

ENTERING UPON LAND AND CUTTING TIMBER IS NOT POSSESSION so as to constitute part performance of a contract of sale.

COURT MUST DETERMINE WHAT ACTS CONSTITUTE POSSESSION so as to defeat an action of trespass, or make out a contract for the sale of the land, so as to take the case out of the statute of frauds, and it is error to leave those questions to the jury.

TRESPASS *quare clausum fregit*, for entering upon the land of the plaintiffs, and cutting and carrying away timber. Pleas, not guilty and *liberum tenementum*. The defendants relied upon a parol agreement with one McDougal, an agent of the plaintiffs, for the purchase of the land, and upon possession taken thereunder by virtue of a parol authority from McDougal. The authority of McDougal was derived from a letter of attorney to him from one Rose, the duly constituted agent of the plaintiffs, authorizing him to survey lots for settlers on the plaintiffs' lands in Tioga county, to receive and note in a book the application of each person for a lot, and to enter into articles of agreement, etc. The material portions of the letter are given or sufficiently referred to in the opinion. The defendants then offered to prove by McDougal that under the said authority he surveyed the land now in question for the defendants; that they made an application to him for a survey and article of agreement; that he promised them they should have the lot, and that he would give them articles of agreement at some convenient time, but that that would make no difference, but they might take possession and use the land as their own. The evidence was admitted against the plaintiffs' objection, and the court left it to the jury to say whether the plaintiffs' constructive possession was not divested by the agreement with McDougal. Verdict and judgment for the defendants, and the plaintiffs sued out this writ of error.

Williston, for the plaintiffs in error.

Maynard, *contra*.

By Court, SERGEANT, J. The defendants having no deed or writing for the land in dispute, seek to take it out of the purview of the act against frauds and perjuries, by alleging a parol contract with the plaintiffs' agent, McDougal, and the part performance of it by the delivery and taking possession of the land in pursuance of such contract. To this, the plaintiffs object the want of authority in McDougal to make such a parol contract, and this raises the first question in the case, whether any such authority existed. No other authority to McDougal is produced, than what is contained in the letter of Doctor Rose to him dated the twenty-sixth of February, 1831, and this, we think, does not contain such an authority. The power given to McDougal by Doctor Rose, when he thus employed him as surveyor and agent, is to survey for applicants, and he is expressly directed "at the time of the survey, to fill up and sign with the purchaser sep-

arate articles of agreement for the lot, printed blanks of which will be furnished you. Of these, send one to the agent of the estate, with the lot marked on the back of it, give one to the purchaser, and retain the other." These directions are precise and positive—marking out a particular plan which was to be pursued in making these sales, intended to prevent doubt, mistake, or litigation, and to ascertain the rights and obligations of the parties by instruments of writing and printing, of which each person interested should be in possession of a counterpart, giving a clear equitable title to the purchaser. But it does not authorize a parol contract or promise at some future day to give to any person a preference of a lot, or a license by which he may enter on the land and cut timber at his pleasure, without conforming to the mode presented by Doctor Rose. All the prudential care taken to have the estates disposed of in a methodical and regular manner, by survey and articles of agreement in triplicate, might be entirely defeated, if the subagent could thus bind the principal by conversation or parol promise, or other loose and irregular modes of every kind that can be thought of, resting on the dubious and frail evidence of parol, and involving, almost necessarily, dispute and controversy, in opposition to the plainly expressed regulations established by the owners, and known to the applicants. For this being a special authority to McDougal, must be strictly complied with: he who dealt with him as subagent, was bound to look to his powers as such, in relation to the property of his principal. Nor can it be imagined that Doctor Rose intended to vest a power, which might lead to the waste and injury of the property, by despoiling it of its timber, under loose conversations, in which neither the price, nor the extent, nor terms were fixed in the authentic mode he prescribed, nothing definite ascertained or determined, and where the party would be afterwards bound, or not bound, as might suit his convenience or caprice.

The whole tenor of the letter contemplates something fixed and ascertained, on all these subjects: and one who chose to rely on anything short of what is prescribed, must be considered, in a court of law or equity, as doing so at his own risk, and as resting on the good-will and favor of the owner, but not as acquiring a title binding on the owner, or one which a court of law or equity can recognize. The other parts of the letter referred to do not seem in the least to vary this view of its terms, or to be inconsistent with what has been quoted. The direction to book the name of the applicant (and no such booking has

ever been produced) was given, as it is expressed in the letter, in order to prevent a charge of partiality, by showing at any time afterwards the time when and the lot for which such person applied: but does not itself give any legal or equitable claim, where it is not followed up by survey and articles. And as to the direction when improvements had been already commenced, that is only for the ascertainment of the time when interest was to commence, in case a survey and articles were afterwards had. But no right could be acquired by an intruder, who entered and cut down timber, or even improved, as against the owner, where it was never accompanied and followed by survey and articles.

There then being no authorized contract, even possession under it would be unavailing to constitute part performance. But there was not a possession here, in a legal point of view, such as would divest the plaintiff's original constructive possession and defeat his action of trespass *quare clausum fregit*. There is no evidence that the defendants had resided or built on the land, or cultivated or fenced it in, or had any *pedis possessio*, or paid the taxes: they had no other occupancy than while they were there cutting off timber: and this would not constitute a possession, though they owned the adjacent tract, and claimed this swamp, or a part of it, and used this woodland. There must be something else to constitute possession, as was held by this court in *Wright v. Guier*, 9 Watts, 172 [36 Am. Dec. 108], where the doctrine is fully examined by Chief Justice Gibson. There, an iron-master bought a tract of woodland at sheriff's sale, with other adjacent tracts, and entered, from time to time, to cut and coal the wood, using it as he did his other woods, claiming it under his sheriff's deed; yet this was held not to be such a possession as would give title under the statute of limitations. Now what acts, if proved, make out a contract sufficient to take the case out of the statute of frauds and pass a title by parol, and what acts constitute a possession such as defeats the action of trespass, are questions of law for the court, in the application of the principles of equity in each case, and it is error to throw these questions on the jury for their determination.

We are, therefore, of opinion, the court below erred in admitting the evidence contained in the bill of exceptions, and also in their charge to the jury on the matters above stated.

Judgment reversed, and a *venire de novo* awarded.

ACTS OF SPECIAL AGENT MUST BE STRICTLY WITHIN SCOPE OF AUTHORITY CONFERRED, in order to bind his principal: *Blane v. Proudft*, 2 Am. Dec. 546:

Thompson v. Stewart, 8 Id. 168; *Munn v. Commission Co.*, Id. 219; *Beale v. Allen*, 9 Id. 221; *Martin v. United States*, 15 Id. 129; *Rossiter v. Rossiter*, 24 Id. 62, and note; *Jeffrey v. Bigelow*, 28 Id. 476. See also *McClure v. Richardson*, 33 Id. 105. In *Hackney v. Alleghany Ins. Co.*, 4 Pa. St. 187, the principal case is cited to the point, that acts of an agent within the scope of his authority are binding on his principal, whether an individual or a corporation. And in *Briggs v. Large*, 30 Id. 291, it is cited to the well-recognized principle that a person dealing with an agent must look to his authority.

ADVERSE POSSESSION TO DISSEISE OWNER, what necessary to constitute: See *Wright v. Guier*, 36 Am. Dec. 108, and cases cited in the note thereto. See also the note to *Casey's Lessee v. Inloes*, 39 Id. 686.

MYERS v. ENTRIKEN.

[6 WATTS AND SERGEANT, 44.]

FACTOR WHO TAKES NOTES IN HIS OWN NAME for goods of his principal, and discounts them for his own accommodation, makes them his own, and will be liable to the principal for the amount of the sales, in the event of the insolvency of the purchaser.

ASSUMPSIT. The jury, under instructions from the court, found for the plaintiff, Entriken, and the defendants sued out a writ of error. The other facts are stated in the opinion.

Lowry, for the plaintiff in error.

Kline, for the defendant in error.

By Court, GIBSON, C. J. The usage of factors, said to prevail in Pittsburgh, to sell on account of their principal, take notes in their own names with an agreement to renew, and discount them for their own accommodation as long as the bank is willing, is a gross imposition, which can never be sanctioned by a court of justice. In this instance the defendants, who are commission merchants, sold at four, six, and eight months; took the purchasers' notes in their own name, and discounted them in bank for their own use. Pursuant to a secret agreement with the purchasers, they were renewed as they fell due, by other notes drawn and indorsed in the same way, till the period of the purchasers' bankruptcy, which occurred eight months and a few days after the sale. There can not be a doubt that the plaintiff below was entitled to the produce of the discounted notes; but the defendants, in place of remitting it to him, employed it in their own business, and now insist that the accommodation was at the plaintiff's risk. It is said the sale was made for a better price than could have been had at a short credit, and that no sale of the article could have been effected on any other terms.

Be it so. But why was not the produce of the notes remitted, and why was not the plaintiff suffered to have the use of his own money? The temptation to abuse, afforded by the usage, is too strong to be tolerated. The greater the number of renewals, the better for the factor, who would have not only his commission, but the use of the money in the mean time; and all at the risk of the principal! Surely that can not be the law. Nothing is more familiar than that the principal is to have all the increase made on his property; and it was held in *Rogers v. Boehm*, 2 Esp. Cas. 704, that an agent is liable for interest, where any has been made, on a balance in his hands. Such is the general rule, though in England there are exceptions to it, where, for instance, the principal was informed of the state of the case, but desired the agent to keep a large balance in hand, as in *Chedworth v. Edwards*, 8 Ves. 48, or where the accumulation was known to the principal for a great length of time, as in *Beaumont v. Boulbee*, 11 Id. 360. Such, however, would scarce be held the rule of interest in Pennsylvania. In *Diplock v. Blackburn*, 3 Camp. 43, Lord Ellenborough said, that a usage authorizing an agent to make a profit by a bill on his principal, is a "usage of fraud and plunder," and not to be tolerated. We are not here, however, on a question of interest or profit made, but on a question whether the defendants did not make the notes their own, by using them as their own.

The point seems almost to have been determined in *Le Fevre v. Lloyd*, 5 Taunt. 749; S. C., 1 Marsh. 318, where a broker who had sold the goods for a bill at a given day, was held liable to his principal on a bill which he himself had drawn on the purchaser. So in *Simpson v. Swan*, 3 Camp. 291, a factor who had taken a security for the price of goods sold in his own name, and who had given his own security to the principal for the proceeds, was held liable on it after the failure of the purchaser. These cases go on the principle that he had treated the original debt expressly as his own; and they do not entirely come up to the point before us. But in *Goodenow v. Tyler*, 7 Mass. 36 [5 Am. Dec. 22], after holding, on very sufficient ground, that a factor who sells on a credit and takes notes in his own name, does not by that alone become liable to the principal in the event of the purchaser's failure. Chief Justice Parsons said, that it would be otherwise were he to negotiate them for his own use. Is not that the very case? The same thing, in effect, was asserted in *Wren v. Kirton*, 11 Ves. 382, where it was said that an agent who places his principal's money to his own account

with his general banker, takes the risk of the banker's failure; for that he can not so deal with it as to be able to treat it as the money of his principal, or as his own, according to the event. Neither could these defendants treat the money in contest as their own, when it suited their convenience to use it, and as the money of the plaintiff, when it suited their convenience to cast the loss of it on him. By discounting the notes for their accommodation, they made them their own, and became personally liable for the amount of sales.

Judgment affirmed.

FACTOR SELLING GOODS CONIGNED TO HIM FOR SALE, and taking notes of vendee which he discounts for his own accommodation, thereby becomes responsible for the amount of the sales, in the event of the insolvency of the purchaser: *Morris v. Wallace*, 3 Pa. St. 323, citing the principal case. But in *Greely v. Bartlett*, 10 Am. Dec. 54, it was decided that where a factor to whom goods are consigned for sale generally, sells them on credit to a merchant in good standing, taking a note payable to himself, and the purchaser becomes insolvent, the factor is not liable for the loss. See to the same effect, *Goodenow v. Tyler*, 5 Id. 22.

EICHBAUM v. IRONS.

[6 WATTS AND SERGEANT, 67.]

MEMBERS OF COMMITTEE OF POLITICAL MEETING, appointed to provide a free public dinner for the party, are personally liable for the bill.

ASSUMPSIT. The opinion states the case.

Williams and Miller, for the defendants.

Darragh and McCandless, for the plaintiff.

By Court, GIBSON, C. J. This case is unique, but readily resolvable on principle. It seemed, at first, to resemble the case of a committee sued for the price of meats and wines furnished on its order to a club; but though the defendants acted in obedience to a constituency, it was unlike a club, which is a permanent body, an intangible and irresponsible one. The plaintiff, being examined without objection, testified that he furnished the dinner on the order of the whig party, but that it was to the committee he looked for payment. It is probable that neither he nor they spent a thought on the subject; but it is not, therefore, to be concluded that he agreed to give the dinner for nothing; and the responsibilities of the parties concerned are to be determined on the ordinary principles of the law of contracts. The facts are, that the defendants and others, being a committee

constituted by a popular meeting to order and manage a dinner, contracted with the plaintiff to furnish it, and directed the secretary of the meeting to report the proceeding to the Tippecanoe Club, an affiliated society, for its approbation.

Now it will not be pretended that nobody was responsible to the plaintiff for the order; and, if the defendants were not, who else was? Were they to be viewed as the agents of a club, we would have something palpable to deal with. The question would be, whether they had become personally liable by having exceeded their authority, or whether they had not contracted on the credit of their constituents. But a club is a definite association, organized for indefinite existence: not an ephemeral meeting, for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass. But the question would not depend on the law of partnership, even were such a meeting to be treated as a club; for though Lord Eldon, in *Beaumont v. Meredith*, 3 Ves. & Bea. 180, and Lord Abinger, in *Fleming v. Hector*, 2 Mee. & W. 179, seemed to have thought that a member of a club is a partner, the notion was exploded by Chief Justice Tyndal, in the last trial of *Todd v. Emly*, cited in Wordsworth on Joint Stock Companies, 183. Neither is it determinable on the law of principal and agent; for there was no principal. At first, I thought the credit might have been given to the primary meetings, on the authority of those cases in which officers have been held liable to have contracted on the credit of the government; but the certainty of payment, in those instances, was so great as to make the moral responsibility of the government the preferable security. Not so the moral responsibility of a populace, which is infinitely weakened by being infinitely divided. In a case like this, the usual presumption of credit is inverted; and, in the absence of evidence to the contrary, the vendor is supposed to have relied on the responsibility of the persons who gave the order. What we have to do, then, is to determine how far each of the defendants was a party to it.

When several dine together at a tavern, each is liable for the reckoning: Coll. Part. 25, note w. But I take it, they are liable jointly and not severally; for though only one should order,

those who approve of it become parties, except where credit is given to one, in exclusion to those who happen to be his guests. This principle is deducible from *Delauney v. Strickland*, 2 Stark. 416. Did the defendants, then, all concur in the order given for the dinner in question? If they did not, the plaintiff can not recover.

It is not disputed that they were present when the measure was definitely adopted; but it is proved that Davis and Eichbaum opposed it while it was under consideration. What then? They at last submitted to the majority, and made the resolution their own. In *Braithwaite v. Skofield*, 9 Barn. & Cress. 401, a member of a committee who was present at the adoption of a resolution to have certain work done, was held liable to the tradesman. Every member present assents beforehand to whatever the majority may do, and becomes a party to acts done, it may be, directly against his will. If he would escape responsibility for them, he ought to protest, and throw up his membership on the spot; and there was no evidence that any of the defendants did so. On the contrary, they all remained till the meeting was dissolved, and the order given. It is true, that Mr. Davis afterwards desired the plaintiff to give the matter up; but the dinner was in preparation, and it was too late to retract. Of what importance, then, is the disputed fact of his having partook of the repast with the rest? Had he done so, his final accession would, according to *Delauney v. Strickland*, have made him liable despite of other considerations; but he had become irrevocably liable by the order of the committee, given in his presence, and apparently with his approbation. The defendants have not pleaded the non-joinder of the other members in abatement; and the evidence showed such a joint liability of those who have been sued, as warranted the direction.

Judgment affirmed.

JOHNSON v. LINES.

[6 WATTS & SERGEANT, 80.]

INFANT IS LIABLE FOR NECESSARIES ONLY, and then only for such quantity thereof as is sufficient to supply his wants.

TRADESMAN WHO FURNISHES SUPPLIES TO INFANT IS BOUND, at his peril, to know that they were actually needed by him.

GUARDIAN'S PERMISSION CAN NOT HAVE THE EFFECT TO CHARGE MINOR personally for articles that are not necessaries, and where a guardian abuses his trust by allowing an infant to run up extravagant bills, the

tradesman can not recover for more than was necessary to relieve the ward's necessities.

WHAT ARE NECESSARIES IS A MIXED QUESTION OF FACT AND LAW; but the court may instruct the jury that an oversupply of goods, otherwise necessary, ceases to be a supply of necessities, as to the excess.

ASSUMPSIT. The facts sufficiently appear from the opinion.

Marsh, for the plaintiff in error.

McKennon, for the defendants in error.

By Court, GIBSON, C. J. The case of the plaintiffs below is poor in merits. It appears that they supplied a young spendthrift with goods which they call necessities, but which ill deserve the name. Their account mounts up to more than a thousand dollars, comprising charges for many articles which might be ranked with necessities when supplied in reason; but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons, in the space of fifteen months and twenty-one days; to say nothing of three bowie knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats, and fancy bag, to match. Such a bill makes one shudder. Yet the jury found for the plaintiffs almost their whole demand, including sums advanced for pocket-money, and to pay for keeping the minor's horses, which no one would be so hardy as to call necessities. How they could reconcile such a verdict to the dictates of conscience, I know not. They surely could not complacently look upon the ruin of their own sons, brought on by ministering to their appetites, and stimulating them with the means of gratification. Every father has a deeper stake in these matters than the public mind is accustomed to suppose; and it intimately concerns the cause of morality and virtue, that the rule of the common law on the subject be strictly enforced. The minor was at the critical time of life when habits are formed which make or mar the man—which fit him for a useful life, or send him to an untimely grave; and public policy demands that they who deal with such a customer, should do so at their peril. This enormous bill was run up at one store; and what other debts were contracted for supplies elsewhere, we know not; but let it not be imagined that the infant's transactions with other dealers did not concern the plaintiffs. "With a view to quantity, and quantity only," said Baron Alderson in *Burghart v. Angerstein*, 6 Car. & P. 700, "you may look at the bills of the other tradesmen by whom the defendant was also supplied; for

if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would be unnecessary. If a minor is supplied, no matter from what quarter, with necessities suitable to his estate and degree, a tradesman can not recover for any other supply made to the minor just after." And the reason for it is a plain one. The rule of law is, that no one may deal with a minor; the exception to it is, that a stranger may supply him with necessities proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity, of which he must judge, in a measure, at his peril.

In *Ford v. Fothergill*, 1 Esp. 211; S. C., Peake's N. P. Cas. 299, Lord Kenyon ruled it to be incumbent on the tradesman, before trusting to an appearance of necessity, to inquire whether the minor is provided by his parent or friends. That case may be thought to have been shaken in *Dalton v. Gib*, 5 Bing. N. Cas. 198, in which it was held that inquiry is not a condition precedent to recovery where the goods seemed to be necessary from the outward appearance of the infant, though the mother was at hand and might have been questioned; but in *Brayshaw v. Eaton*, Id. 231, this was explained to mean that, as such an inquiry is the tradesman's affair, being a prudential measure for his own information, the omission of it is not a ground of nonsuit; but that the question is, on the fact put in issue by the pleadings, whether the supply was actually necessary. It is the tradesman's duty to know, therefore, not only that the supplies are unexceptionable in quantity and sort, but also that they are actually needed. When he assumes the business of the guardian for purposes of present relief, he is bound to execute it as a prudent guardian would, and, consequently, to make himself acquainted with the ward's necessities and circumstances. The credit which the negligence of the guardian gives to the ward, ceases as his necessities cease; and, as nothing further is requisite when these are relieved, the exception to the rule is at an end. In this case, the supply of articles which were proper in kind, was excessive in quantity. I impute no intentional wrong to the plaintiffs, for they dealt with the intestate, as others may have done, evidently supposing him to be *sui juris*; but I certainly do blame the jury for finding nearly the whole demand, after it had been conceded that he was an infant.

That the charge, though not palpably wrong in the abstract, tended to mislead in its application to the facts, is visible in the

verdict it produced. The defendant went to the court for direction that the plaintiffs could not lawfully deal with the infant, even for necessities, unless the guardian had refused to furnish them; and had, for response, a direction that "the plaintiffs had no right to deal with the deceased, unless by the permission, express or implied, of the guardian; or unless the guardian had refused to furnish necessities for his ward." This very significant addition to the principle assumed in the prayer, was meant to indicate a liberty to deal by permission beyond the bounds of necessities, or it meant nothing. It indicated that an authority to deal with a minor in a way to charge him personally, emanates from his guardian's permission, which is paramount, or at least equal, to the authority so to deal with him, that emanates from his necessities. The jury would naturally so understand it. And this was predicated in reference to the question before them, whether the ward's estate could be subjected to payment for luxuries. They might readily understand, therefore, that the guardian's permission to run up this bill would charge the ward's estate with it, independently of its propriety. If that was not the drift of the direction, it is not easy to see why anything was said about permission at all.

In a case of doubtful propriety, I can readily understand how the guardian's sanction, or that of a relative, might justify a supply beyond the limits of strict necessity, which a dealer might furnish *bona fide* on the credit of the ward; but though the guardian might subject himself to payment of a grossly improvident bill, by a permission amounting to an order, his connivance at an improper supply by a tradesman, would not subject the ward to payment of it. Indeed, it has been said (3 Wils. Bac. 595, in marg.), to have been several times decided, that where credit has been given to the parent or guardian, the creditor has no recourse to the infant. The guardian is set over the ward for the very purpose of preventing him from making such a bill; and his desertion of his trust would not help the case of one who had dealt with the ward *mala fide*. As, then, the plaintiffs were bound to know that the guardian abused his trust in allowing the infant to run up this bill, they can recover no more of it than was proper to relieve the ward's necessities. This notion that the guardian's permission might legitimate the demand, may have had a misleading influence on the jury; for a passive acquaintance with the transaction which the law would presume from his duty to have an eye on the doings of the ward, would be a constructive permission; or it might be

implied from the fact that he had left the ward to shift for himself.

Again. The defendant prayed direction, "that if the plaintiffs were justifiable in dealing with the ward, the bill is so exorbitant that the plaintiffs themselves could not have considered them (the goods) necessary; and that they are therefore not entitled to recover:" in answer to which, the court charged that "what are necessaries, is a question of fact mixed with law. It is to be decided by the jury under the direction of the court, and depends on the estate, circumstances, and pursuits of the minor. The jury will probably think this bill extravagant, and that the plaintiffs could not have supposed many of the items necessary: some of them, they must have known, were not necessary. The plaintiffs can not recover for what were not necessities." Not a word in this, in response to the prayer for direction as to the effect of the plaintiffs' consciousness that the supply was extravagant; though consciousness would affect them with *mala fides*, and deprive them at once of whatever merit they might otherwise pretend to have from the guardian's implied sanction. The judge said truly, that what are necessities, is a question mixed of fact and law; but he did not say, as he might and perhaps ought to have done, that an oversupply of goods otherwise proper, ceases to be a supply of necessities as to the excess. The jury were indeed left to say what were necessities; but rather as regards the sort than the quantity, in respect to which the effect of excess was overlooked throughout. Had it been properly impressed, the jury could not have found more than a fourth part of the bill. To them doubtless belongs the question of extravagance; but where the supply has been so grossly profuse as to shock the sense, it is the business of the judge to say so as matter of law, and charge that there can be no recovery for more than was absolutely necessary.

Judgment reversed, and a *venire facias de novo* awarded.

NECESSARIES FOR INFANT: See *Grace v. Hale*, 36 Am. Dec. 296, note 296, where other cases in this series are collected.

HALDEMAN v. MICHAEL.

[6 WATTS AND SHERBURN, 128.]

CONFESSION OF JUDGMENT TO CREDITOR WITH VIEW TO PREFER HIM, is not invalid, as contravening the provisions of the bankrupt act, where it is not voluntary, but the effect of measures taken by the creditor, or which it was in his power to take; and a party who undertakes to defeat such a transaction is bound to show clearly that it is voluntary.

MOTION. The facts are sufficiently stated in the opinion of the district court, which is given below.

HAYS, President. The bankrupt act declares that all future securities, etc., given by any bankrupt in contemplation of bankruptcy and for the purpose of giving any creditor, etc., any preference or priority over the general creditor of such bankrupt, shall be deemed utterly void and a fraud upon such act. This enactment can not affect the judgment of John Friday, of June term, 1841, No. 245, for nine hundred and sixty-nine dollars, which was entered on the third day of August, 1841; because that was before the passage of the act. Nor is that judgment, indeed, included in the enumeration of those of which the petitioners complained. "All the provisions of the act as to voluntary or involuntary bankruptcy"—this is the language of Judge Story—"are prospective; that is, the parties and the facts must exist and fall within the predicaments pointed out after the passage of the act:" 5 Law Rep., No. 7, p. 295. It was on this judgment that the defendant's real property was taken in execution and sold by virtue of the writs mentioned in the last of the above rules. These proceedings were clearly not in contravention of the bankrupt law, but were the regular judicial consequences of the lien obtained by Friday before the law existed. The rule to show cause why the *fieri facias*, levy, inquisition, condemnation, the *venditioni exponas* and sale thereon made in the case of *Friday v. Michael* shall not be set aside, must therefore be discharged.

The judgment of Haldeman against the defendant was entered and the bond, with the warrant to confess judgment, was given after the passage of the bankrupt law; namely, on the second day of July, 1842. On the same day, the *fieri facias* was issued on which the personal property of the defendant was levied and sold. This was two months and twenty days before the petition of Boyd and Cummins, to have Michael declared bankrupt, was filed. That the judgment bond was executed for the purpose of giving Haldeman a preference over the general creditors of Michael, there can be no doubt; but that it was given in contemplation of bankruptcy, it lies upon the general creditors to prove. According to the American cases, which arose under the bankrupt act of 1800, as well as the English authorities on the subject of bankruptcy, payment or security to a creditor, and with a view to prefer him, is valid, if it be not voluntary, but the effect of measures taken by the creditor, or in his power to take. The slightest solicitation on the part of the creditor

will protect the transaction. Unless it clearly appear that the act originated with the debtor, and that he took the first step to make the transfer, it will not be deemed a fraudulent preference; and it is incumbent on the party who seeks to defeat the transaction, to show that it is voluntary. In *Phoenix v. Dey*, 5 Johns. 412, in the court of errors of the state of New York, it was said by Spencer, J., in delivering the opinion of the court, "that an insolvency is no objection to giving a preference, unless it be shown that a bankruptcy was contemplated at the time, was decided in the supreme court in the case of *McMenomy v. Ferrers*, 3 Johns. 83. That principle will be found admitted and acted upon in a great variety of cases. It is founded in the right which every man has to dispose of his property to whom he pleases, for an adequate consideration, and in satisfaction of his debts, until he commits an act of bankruptcy, or contemplates so to do; and where a part only of the insolvent's estate is transferred for the payment of a just debt, though the act be voluntary on the part of the insolvent, the transaction is not on that ground impeachable." *Phoenix v. Dey*, 5 Id. 426, 427.

The evidence in this case clearly shows that the judgment bond given to Haldeman was not voluntary in the sense of these authorities; that Michael did not take the first step in regard to it; but that it was anxiously sought by the plaintiff, who insisted upon it, in order that he might be placed on an equal footing with two other creditors, to whom the defendant had given similar securities. It also appears that the defendant, instead of voluntarily or spontaneously giving such bond payable on demand, was desirous of having it made payable in six months after date, in which he was overruled by the plaintiff, by whose agent he was told, when he suggested the delay in payment, that this bond was in the form which Haldeman commonly used. Again; this security by no means covered the whole amount of the defendant's property; estimating it according to the proceeds of the subsequent sales by the sheriff, and taking also into the account the prior liens, there would be still a surplus; and it appears from the deposition of Roberts that Michael valued his real estate at three thousand dollars, and said it cost him more, though it yielded but one thousand seven hundred and fifty-four dollars and forty-four cents when sold. The evidence further shows that the bond to Haldeman was not given in contemplation of bankruptcy, but that Michael had at that time made new purchases of goods on credit, in order to prosecute his business, and that on finding, to his manifest surprise,

the sheriff had seized his personal property, he directed these goods which were *in transitu* to be returned to the vendor. As the making of that security was not an act of bankruptcy, so *a fortiori* was not the previous judgment bond given on the first of June, 1842, to Killinger, Shertzer, and Bowman; and much less the judgment obtained by Friday, already noticed.

I am, therefore, clearly of opinion that this case falls within the provisos of the second section of the bankrupt law, which are as follows: "Provided, that all dealings and transactions by and with any bankrupt, *bona fide*, made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act: Provided, that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy or of the intention of the bankrupt to take the benefit of this act; and provided, also, that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on properties real or personal, which may be valid by the law of the states respectively and which are not inconsistent with the provisions of the second and fifth sections of this act." Accordingly, the rule on behalf of the assignee of the bankrupt to show cause why the judgment of Haldeman, of June term, 1842, No. 174, shall not be vacated and the execution set aside and the sheriff ordered to pay the proceeds of sale of personal property to the assignee in bankruptcy of the defendant, is discharged. And the rule to show cause why the amount of the plaintiff's judgment should not be paid out of the proceeds of the defendant's property now in court, is made absolute.

The assignee sued out a writ of error to this court.

Errors assigned: 1. The court erred in discharging the rule to vacate the judgment of *Haldeman v. Michael*, and also in discharging the rule to vacate the judgment of *Friday v. Michael*; 2. In directing and decreeing the money in court to Haldeman.

Frazer and Parke, for the plaintiff in error.

Stevens and Ellmaker, contra.

By COURT. The decree of the court is affirmed for the reasons given by Mr. Justice Hayes.

Decree affirmed.

CITED in *Wilkinson's Appeal*, 4 Pa. St. 291, to the point that a bond with warrant of attorney to confess judgment, which was given two months and

twenty days before the petition to have the debtor declared a bankrupt was presented by his creditor, and on which a *f. fa.* was issued on the same day that the bond and warrant were given, is valid, and does not constitute an act of bankruptcy.

INSOLVENT DEBTOR MAY PREFER CREDITORS: See *Woodbury v. Bowman*, 21 Am. Dec. 40, note 45, where other cases in this series are referred to.

BOND v. AITKIN.

[6 WATTS AND SERGEANT, 165.]

PARTNER MAY BIND HIS COPARTNER BY CONTRACT UNDER SEAL, in the name and for the use of the firm, in the course of the partnership business, if the copartner assents to the contract before its execution, or afterwards ratifies and adopts it; and such assent or adoption may be by parol.

BOND OF ONE PARTNER TAKEN AT TIME MONEY IS LOANED to the partnership, and as the consideration for such loan, is an extinguishment of the debt, and not a collateral security.

DEBT, brought by Bond against John and James Aitkin, on the following note:

"Six months after date we promise to pay Charles Bond, or order, four hundred dollars, with five per cent. interest, without defalcation, for value received. Witness our hands and seals, this first day of October, 1836.

"JNO. & JAS. AITKIN.

The other facts appear from the opinion.

Edwards and B. Tilghman, for the plaintiff in error.

Lewis, *contra*.

By Court, SERGEANT, J. The question arising in this case has undergone a thorough discussion in the two late cases of *Gram v. Seton*, 1 Hall, 262, and *Cady v. Shepherd*, 11 Pick. 400 [22 Am. Dec. 379], where all the authorities are examined, and the principle is settled that a partner may bind his copartner by a contract under seal, in the name and for the use of the firm, in the course of the partnership business, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol. And we are satisfied that the rule is founded on principles of justice and policy, and supported by the general tenor of the adjudged cases in this country and in England. The only question in the present case is, whether there is any evidence to go to the jury to show that James Aitkin assented to

the giving of the sealed bill in the name of the firm, before or at the time of its execution, or afterwards ratified it; and we think there is. The admissions made by him in the conversation with Carter, if believed, in connection with the fact that the money was got for the firm and went to its use, are evidence to go to the jury. He said that though he did not know of it at the time it was given, yet, if he had, he would have been perfectly satisfied; if he could make collections, he would pay it in October. He repeatedly desired it should be sued as a partnership claim, and declared the note was as good as if he gave his individual note. This and the whole tenor of the conversation tend strongly to the inference that he had authorized the giving of it; and we think the evidence ought to have been left to the jury, to say whether such authority was given, or whether the defendant subsequently ratified the instrument.

On the additional count, we think the plaintiff has not shown a right to recover. Where the bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment and extinguishment of such debt, or only a collateral security, according to the nature of the transaction and the circumstances attending it: *Wallace v. Fairman*, 4 Watts, 378. But where there is no antecedent debt, but the bond of one partner is taken at the time money is loaned to the partnership, and as the consideration for loaning the money, it can hardly be treated as a collateral security. It must be considered as all one transaction, and the bond as the only security contemplated; unless, perhaps, there were strong and positive evidence to show an express agreement to the contrary by all parties. If so, then in this case the bond was the only debt; the plaintiff, if he recovered at all, must recover on it, and not on the money counts. And as there was no implied contract by both, so the express promise proved was only by one; and, therefore, we are of opinion the charge of the court below was correct, that the plaintiff could not recover on the additional count.

Judgment reversed, and a *venire de novo* awarded.

PARTNER'S EXECUTING UNDER SEAL IN THE NAME OF THE FIRM, an instrument which does not require to be sealed, does not render it void. It may be treated as a valid writing by parol: *Tapley v. Butterfield*, 35 Am. Dec. 374, note 377. In *Turbeville v. Ryan*, 34 Id. 622, it was decided that authority under seal is necessary to enable one partner to bind his copartner by a note under seal in the name of the partnership, and that previous parol assent or subsequent adoption will not render the unauthorized bond of a copartner binding as to the other. See also note to that case, where the cases on this subject contained in this series are referred to.

THE PRINCIPAL CASE IS CITED in *Johns v. Battin*, 30 Pa. St. 89, to the point that a partner may bind his copartner by a contract under seal in the name and for the use of the firm, in the course of the partnership business, if the copartner assents to the contract before its execution, or afterwards ratifies and adopts it, and such assent or adoption may be by parol; also in *Schmata v. Shreene*, 62 Id. 460, to the point that either prior assent, or subsequent ratification if the power is implied, will be sufficient to make such contract binding.

ZIMMERMAN v. ANDERS.

[6 WATTS AND SERGEANT, 213.]

WORD "ESTATE" STANDING BY ITSELF CARRIES A FEE, but it is not a word of art, but of interpretation, and its meaning is affected by other clauses and dispositions in a will.

WHERE TESTATOR GIVES TO HIS WIFE "THE RESIDUE AND REMAINDER OF HIS ESTATE NOT BEQUEATHED," and then proceeds to give to another what is left after paying her funeral expenses, the intention to give her an estate for life only, is manifest, and the limitation over is not repugnant to the previous devise, but explanatory of it.

WHERE DEVISEE FOR LIFE DIES BEFORE THE TESTATOR, the remainderman takes an immediate estate in possession upon the testator's decease.

DEVISE TO ASSOCIATION FOR RELIGIOUS PURPOSES, UNINCORPORATED at the time of the testator's death, but since incorporated, is good in Pennsylvania.

THE CONSERVATIVE PROVISIONS OF THE STATUTE OF 43 ELIZ., c. 4, are in force in Pennsylvania by common usage and constitutional recognition.

EJECTMENT. Edmund Flinn was in his life-time seised in fee of the land in question. He died in 1836, having first made his last will and testament in the year 1831, in which he devised to his wife, Maria Flinn, all his real and personal estate not bequeathed. The will then provided that after her funeral expenses were paid the remainder should go to the Schwenkfelder Society, to be for the poor of the society. Maria Flinn died about the year 1832. The society above named was not incorporated at the time of the testator's death, nor at the time of the bringing of this action, but is now. The court below gave judgment for the plaintiffs, who were the officers of said society.

Dimond and Mulvany, for the plaintiff in error.

Brooke, contra.

By Court, SERGEANT, J. The intent of the testator must govern, in the interpretation of wills, if there be nothing in that intent which conflicts with the regulations of law concerning the nature and enjoyment of estates. If there be a devise of land to one in fee with the power of absolute disposal super-

added, and then a limitation over to another of what is left at his decease, it has been decided that such limitation over is void because it is repugnant to the estate in fee first granted, and to the absolute gift to the first taker, and that was the point in *Jackson ex dem. Livingston v. Robins*, 15 Johns. 169; S. C., 16 Id. 537. But here there are no expressions showing that the wife was to have the whole disposal of the lot; and though the word "estate" standing by itself carries a fee, yet it is not a word of art but of interpretation, and its meaning is affected by other clauses and dispositions in the will. If the testator had stopped at the devise to his wife of all the residue and remainder of his real and personal estate, no doubt, she would have had the fee by virtue of the words, "residue and remainder of his estate not bequeathed;" but when he proceeds to dispose of it after her decease by giving over to another what is left after paying her funeral expenses, the intention to give her an estate for life only is manifest, and the limitation over is not repugnant to the previous devise but explanatory of it. We think, therefore, that Maria Flinn took under the will an estate for life in this lot, with vested remainder to the plaintiffs, who by reason of the death of the wife before the testator became entitled to an immediate estate in possession on the testator's decease.

The next question is, whether the plaintiffs could take the lot in question by virtue of the devise, being then, and for a long time, an unincorporated association for religious purposes, and now incorporated, existing in the county of Montgomery, in this state. That such a devise is good, and that a religious society may take and hold a bequest or devise for charitable purposes, has been too solemnly and repeatedly adjudicated to be now called in question. No judge of this state has in any case doubted it, and every decision has sanctioned it. And it must needs be so, whether we consider either the uniform understanding and usage of the province and state from its first settlement, or the repeated recognitions of these rights and privileges by distinct and peculiar clauses in our constitutions, or the well-known and long-settled principle of our courts, that equity forms part of the law of Pennsylvania, and that the doctrines of the English court of chancery will be enforced in our decisions so far as they are applicable to our situation and capable of being administered by the forms of our judicial tribunals, either in a common law proceeding, or in such branches of equity jurisdiction as are expressly given. And though the statute of 43 Eliz. is not in force in Pennsylvania, it would

seem it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions; these, I conceive, have been in force here by common usage and constitutional recognition, and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it. Of such recognition of parts of a statute, though the statute itself be not in force, we are not without other examples. It is unnecessary, however, to enlarge on a point so often considered and fully and ably examined in the various decisions. We think the devise to the plaintiffs clearly good, and that by the settled law of this state they are capable of taking and holding the lots in question for the purpose expressed in the will.

Judgment affirmed.

CITED in *Pepper's Will*, 1 Para. 450; in *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 192; in *Price v. Maxwell*, 28 Pa. St. 35; and in *Miller v. Porter*, 53 Id. 299, to the point that the conservative provisions of the statute of 43 Eliz. have been in force in Pennsylvania, by common usage and constitutional recognition; and in *Burton's Appeal*, 57 Id. 218, to the point that religious bodies, invested with the powers of quasi corporations, have been allowed to acquire and hold property for charitable purposes.

REQUESTS TO UNINCORPORATED SOCIETIES: See *Burbank v. Whitney*, 35 Am. Dec. 312, note 318, where other cases are collected. Also, *McIntire v. Zanesville Canal and Mfg. Co.*, 34 Id. 436, note 441.

PATTERSON v. POINDEXTER. BOKER v. HAZARD.

[6 WATTS AND SHERBURN, 227.]

NOTHING IS A PROMISSORY NOTE IN WHICH THE PROMISE TO PAY is merely inferential; hence an instrument in the following words, signed by the cashier of a bank, is not a promissory note: "I hereby certify that C. S. Tarply has deposited in this bank, payable twelve months from first May, 1839, with five per cent. interest till due, per annum, three thousand six hundred and ninety-one dollars and sixty-three cents, for the use of R. Patterson & Co., and payable only to their order upon the return of this certificate." Such instrument is a certificate of deposit on special terms; for purposes of commercial responsibility it is not negotiable, but is merely a special agreement to pay the deposit to any one who presents it and the depositor's order.

WRITS of error to the district court of the city and county of Philadelphia. The first action was brought by Poindexter against R. Patterson & Co., on the following instrument:

"MISSISSIPPI UNION BANK, JACKSON, MISS., July 2, 1839.

"No. 716. I hereby certify that C. S. Tarply has deposited

in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, per annum, three thousand six hundred and ninety-one dollars and sixty-three cents, for the use of R. Patterson & Co., and payable only to their order upon the return of this certificate.

“(Signed) C. W. CLIFTON, Asst. Cashier.”

Across the face were written these words: “Regular number, seven hundred and sixteen. W. H. Wilkinson, Teller;” and on the back was indorsed: “Presented 1st May, 1840. William P. Wynn, Teller. Pay Edward Yorke, Esq., or order. R. Patterson & Co. Without recourse to me. E. Yorke.” The defendants below filed an affidavit of defense, which the court decided to be insufficient, and entered judgment for the plaintiff. The other suit was brought by Hazard against Boker on the following instrument:

“MISSISSIPPI UNION BANK, JACKSON, MISS., July 2, 1839.

“No. 726. \$1,115.52. I hereby certify that C. S. Tarply has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, eleven hundred and fifteen dollars and fifty-two cents, for the use of Charles S. Boker, and payable only to his order upon the return of this certificate.

C. W. CLIFTON, Asst. Cashier.”

On this was indorsed: “Pay to the order of T. T. & K. Leavel. Charles S. Boker, Philadelphia. Pay R. G. Hazard, or order, without recourse to us. T. T. & K. Leavel. Presented May 1, 1840. William P. Wynn.” In this case also the defendants filed affidavits of defense, which the court held to be insufficient, and entered judgment for the plaintiff. These cases were argued at December term, 1842, by Gerhard and Randall for the plaintiffs in error, and Bayard for the defendants in error; and were reargued at this term before the whole court, by

F. W. Hubbell and Randall, for the plaintiffs in error, and

Bayard and Rawle, contra.

By Court, GIBSON, C. J. The application of a few plain principles will determine the character of the paper before us. In the first place, nothing is a promissory note in which the promise to pay is merely inferential; or, as Mr. Justice Bosanquet expressed it in *Horne v. Redfearn*, 6 Scott, 267, in which there is “no more than a simple acknowledgment of the debt, with such a promise to pay as the law will imply.” What more have we in the paper before us? “I hereby certify that C. S. Tarply has

deposited in this bank, payable twelve months from the first of May, 1839, with five per cent. interest till due, per annum, three thousand six hundred and ninety-one dollars and sixty-three cents," is the language, not of a promissory note, within the statute of Anne, but of a certificate of deposit on special terms. The argument for the indorsee is that the word "payable," which is repeated, constitutes an express promise to pay. If that were its office, its repetition would have been unnecessary. But the words "yielding and paying," which are certainly more pointed, because they serve to indicate the fact of payment, and not, as here, the existence of circumstances connected with it, have been held to create no more than an implied covenant in a lease; and though there are conflicting decisions on the point, the weight of authority inclines to the side of implication. Sergeant Williams treats the law as if it were so settled in *Thursby v. Plant*, 1 Saund. 231, note 5. Independent of that, we must look at the word to discover the sense in which it was used by the parties, not to ascertain how far it will bear to be strained by construction; and it is obvious that being used in the first instance in connection with words of time, its office was not even to acknowledge a debt, for that was done more directly by the certificate of deposit; but to specify the day when the depositors should have their money again, with interest for the use of it in the mean time. Nor do the superadded words, "for the use of R. Patterson & Co., and payable only to their order upon the return of this certificate," make the case a jot the stronger. The agent of the Messieurs Patterson deposited their money under a stipulation that it should be returned to their special order, on presenting the certificate, with interest at a day certain. The word "payable" was introduced a second time, evidently not to create an express undertaking, but to add a condition to the undertaking which was implied by the law. It was to restrain the generality of the implied obligation, and not the more explicitly to enunciate it. What more was it designed to express, than would have been expressed by the word "returnable"? Yet that word would no more create an express promise than would the word "accountable," which was not allowed to have that effect in *Horne v. Redfearn*. The word "payable" naturally expresses no more than that the thing of which it is predicated is the subject of payment; and where the parties have used it in its natural sense, by what authority shall we, who profess to be guided by the intention as the polar star of interpretation, say that they have used it in a different one?

But though the word were taken for an express promise, it would not sustain the action, unless it were taken also for an absolute and unconditional one; and a promise to pay on the return of the certificate would have been contingent. True it is that such a contingency is no more than is implied in every promissory note; for ordinarily there can be no recovery at law where the paper is lost or mislaid, though there may be a recovery in equity, indemnity being given; but it is, to say the least, doubtful whether a chancellor could relieve against the express terms of a contract imposing nothing like a penalty. Be that as it may, it is enough for the defense that the bank did not consent to pay on the bare order of the depositors, however signified; but on the foot of the certificate itself. Had it been contemplated that the ownership of the deposit should be transferable only by indorsement of the certificate, like that of a promissory note, such a condition would have been useless; for the indorsement would have been inseparable from the certificate, and could not have been presented without it; but not so a check to which the provision was intended to apply. It was doubtless understood that the ownership of the deposit might pass indifferently by check or indorsement; and it was doubtless to provide against inconsistent transfers and consequent embarrassment of the bank as a stakeholder between antagonist claimants, that a condition was introduced, which was as foreign to the terms of a promissory note, as would be a condition to pay out of a particular fund.

Again: the agreement for interest is a special one. The money was deposited on the second of July, 1839, "payable twelve months from the first of May, 1839, with five per cent. interest till due;" and if the parties intended to reserve interest only from the date, why did they not say so, and name the ensuing first of May as the day of payment? They seem to have agreed that interest should be calculated from a day past, because for no other purpose than to express such an agreement was it necessary to recur to a day past. Had it been intended to designate the ensuing first of May as the day of payment, and to reserve interest from the date, it would have been much more easy to say so in terms than by circumlocution. A promissory note, though constituted by no precise form of words, is a plain, unambiguous, and unconditional promise to pay, and is so described in all the transatlantic authorities.

It is argued that those authorities have been warped by the statutes which impose stamp duties on notes, which by reason

of their penal tendency, are to be construed benignly. In only one of them, however, is there a definition of the instrument; the others left it to be dealt with as it stood under the statute of Anne. By 5 Geo. III., c. 184, "all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum, importing that interest shall be paid for the money so deposited," shall be deemed to be promissory notes within the purview of the statute; and it is because we have no such statute here that we hold this certificate not to be negotiable. It will be perceived that the legislation on the subject widened rather than narrowed the frame of the instrument, as it was originally constituted; and that it was the duty of the judges to follow out, rather than evade the policy of the legislature, for the suppression of those frauds which, we are told by Chief Justice Tindal, in *Horne v. Redfearn*, had been practiced on the revenue. They must consequently be supposed to have held everything to be a promissory note, which could by any reasonable construction be brought within the range of the statutes. Mr. Dwaris (*Treatise on Statutes*, 736) says that penal statutes are taken literally only in the point of defining and setting down the fact and the punishment; and for the position that the court is not to narrow the construction of them, he quotes the words of Mr. Justice Buller, in *Rex v. Hodnett*, 1 T. R. 96: "We are to look to the words in the first instance, and where they are plain, we are to decide on them. If they are doubtful, we are to have recourse to the subject-matter." As the letter of no statute was in the way of a liberal construction, the judges were doubtless disposed to adopt it so far as the words of the statute of Anne would bear. But before 22 Geo. III., c. 33, no stamp duties were imposed on bills or notes; and the series of decisions which established that a promissory note must be for a sum of money payable absolutely, and not contingently, either as to amount, person, event, or fund, began even in the reign of William III. It was not the penal consequences of the stamp acts there, but the convenience of commerce, which compressed bills and notes into the fewest words, importing a general undertaking, unclogged with conditions.

It is argued, however, that whatever be the character of the certificate, the indorsement of it is effectively a bank-check, which has most of the properties of an inland bill. But not to insist on the rule that a check be payable to bearer on demand, it is essential that it be not merely an indorsement to order, but

a request addressed to the bank to pay, on presentment, a specified sum of money; and in these particulars an indorsement is deficient. The sum requested to be paid could be ascertained only by reference to the sum specified in the body of the writing, and by making the certificate a part of the supposed check; thus turning it from a certificate of deposit into, not indeed a promissory note, but what it less resembles, an inland bill of exchange. None but a commercial instrument is a subject of reference for the terms of an indorsement. True it is that the indorser of a note without negotiable words is responsible on the contract by reason that the indorsement is a new drawing. But such a note is nevertheless within the statute of Anne, and may be declared on as such. That the indorsement of a specialty is followed by no commercial responsibility, was determined in *Frevall v. Fitch*, 5 Whart. 325 [34 Am. Dec. 558], which is decisive of this part of the case. The contract of indorsement is not an independent one, but a parasite which, like the chameleon, takes the hue of the thing with which it is connected. Attached to commercial paper, it becomes a commercial contract, operating as a contingent guaranty of payment, and a transfer of the title where the paper is negotiable: attached to any other chose in action, it becomes an equitable assignment of the beneficial interest without recourse to the assignor. Now, that the instrument before us is not a commercial one, is decisive of the cause. For purposes of transfer merely, it was payable to order; for purposes of commercial responsibility, it was not negotiable. It was a special agreement to pay the deposit to any one who should present the certificate and the depositor's order. Why was it held in *Little v. Slackford*, 1 Moo. & M. 171, that the words, "Mr. L., Please to let the bearer have seven pounds, and place it to my account," did not constitute a bill of exchange? Lord Tenterden said it was because the request did not purport to be a demand by one having a right to order. A better reason seems to be that the tone of the request did not indicate a willingness to incur the responsibility which ensues from the drawing of such a bill. The indorsement on this bill is still less indicative of it, and no more resembles a banker's check, than would the indorsement of an entry of deposit in a bank-book. As the decision on this point is conclusive of the whole matter, it relieves us of the objection to the action on the ground of parties.

Judgment reversed, and a *procedendo* awarded.

CITED in *Austen v. Miller*, 5 McLean, 156, and in *Lebanon Bank v. Mangas*, 28 Pa. St. 458. to the point that a certificate of deposit is not a promissory

note; in *Charnley v. Dulles*, 8 Watts & S. 361, to the point that an instrument of the same kind as that under consideration in that case, is a certificate of deposit, transferable by indorsement, which does not render the indorser liable for its payment; in *Gillespie v. Mather*, 10 Pa. St. 361, to the point that an indorsement of an instrument not negotiable does not vest in the plaintiff a title to sue on it in his own name; and in *Raymond v. Middleton*, 29 Id. 532, to the point that a contract is a parasite, which, like the chameleon, takes the hue of the thing with which it is connected. The principal case is also distinguished in *Overton v. Tyler*, 3 Id. 347.

NEGOTIABLE INSTRUMENT, WHAT IS A: See *Thompson v. Sloan*, 35 Am. Dec. 546, note 551; *Cook v. Satterlee*, 16 Id. 432, note 433. See also note to *Woolley v. Sergeant*, 14 Id. 421.

SEALED INSTRUMENT, THOUGH IN FORM A PROMISSORY NOTE, is a specialty, and no liability arises from an indorsement thereon: *Frevall v. Fick*, 34 Am. Dec. 558, note 560.

CERTIFICATES OF DEPOSIT, WHEN NEGOTIABLE: See note to *Woolley v. Sergeant*, 14 Am. Dec. 426.

HENNESSY v. WESTERN BANK.

[6 WATTS AND SERGEANT, 300.]

DEED OF ASSIGNMENT EXECUTED BY ONE PARTNER ONLY, CAN NOT BE AVOIDED on that ground, when the property has been delivered to the assignee.

ASSIGNMENT BY PARTNERS, WHICH STIPULATES FOR A RELEASE, IS INVALID, unless it transfers the separate estate of each of the partners, and this although it may not affirmatively appear that the partner who failed to execute the deed of assignment had any separate property.

CLAUSE IN ASSIGNMENT GIVING ASSIGNEE POWER TO APPOINT AGENTS AND ATTORNEYS to collect the assets of the debtor, and to remove or dismiss such agents or attorneys, does not invalidate the assignment; nor does a clause exempting the assignee from liability for effects that shall not come to his hands, or for losses which are not due to lack of diligence and fidelity on his part.

GIVING MORE TIME TO FOREIGN CREDITORS than to those residing within the United States, within which to execute a release, does not make the assignment invalid. Such a discrimination is but just.

ERROR to the district court of the city and county of Philadelphia. The plaintiffs had obtained a judgment against Knox, Boggs & Co., and issued an attachment of execution, which was levied on funds in the hands of the defendant, deposited there by the assignees of said Knox, Boggs & Co. In the court below, on the trial of the plea of *nulla bona*, the court granted a nonsuit on the grounds stated in the opinion. The other facts appear from the opinion.

J. Fallon and C. Fallon, for the plaintiffs in error.

Meredith, contra.

By Court, ROGERS, J. On the trial the defendant moved for a nonsuit. It was contended by the plaintiffs that they were entitled to a verdict against the bank, who were the garnishees, because the assignment of May, 1837, appeared on its face insufficient to transfer the property of Knox, Boggs & Co., as against their creditors. But the court, disregarding this point, ordered a nonsuit on the ground that property fraudulently assigned, is not attachable under the act of 1836, in the hands of the fraudulent assignee. In this opinion, however, the court was mistaken, as appears from the case since decided of *Stewart v. McMinn*, 5 Watts & S. 101 [39 Am. Dec. 115]. But if the nonsuit was properly ordered, but for a wrong reason, we must suffer it to stand; and this makes it necessary to consider the second error assigned, "in not deciding that the assignment was fraudulent and void as against the creditors of Knox, Boggs & Co." Various reasons are urged against the validity of the assignment, the principal of which are, that after stipulating for a release from the creditors, who are required to execute the same in a limited time, so as to partake of the fund, the assignors, who were partners, have neither transferred their partnership nor separate estate. Out of this general proposition two questions arise: first, whether the assignment being by deed and made by two of the partners only, is not binding on the third, and therefore void; and secondly, whether the deed is void because it contains no assignment of the separate property of one of the partners.

After the case of *Deckard v. Case*, 5 Watts, 22 [30 Am. Dec. 287], the first point must be considered as settled in this state. It is there ruled that one partner may transfer the whole stock in trade of the firm; and if possession be delivered, and the transaction be *bona fide*, it matters not whether the instrument be under seal or not. Here there is no allegation of fraud, and in that respect it comes within the principle of the case cited. There, as here, the objection was made without avail, that one partner can not bind his copartner by deed. In all essential particulars the cases are identical. The principle that one partner can not bind his copartner by deed, only holds in an executory and not an executed contract, as for example, where a partner seeks to bind his copartner by a bond for the payment of money, or the performance of a collateral condition. And the cases, when examined, will all be found to be of this description. It would be a strange misapplication of a principle which has been already extended far enough, that where a partner in the

regular course of business sells an article by a contract under seal, it should not bind the firm; and further, that even where the article is delivered in pursuance of the contract, it may be avoided. It has been decided that a release is good notwithstanding a seal, and certainly a seal would not destroy the efficacy of a receipt: Com. Dig., tit. Merchant, note H, 153. By the execution of the contract consummated by delivery, the property is transferred to the assignees, which can not be avoided by the fact that the instrument, which is the evidence of the agreement, is under the seal of one of the partners only. In *Harrison v. Sterry*, 5 Cranch, 300, it is decided that an assignment of funds for the payment of debts is in the course of trade; and whether it be a general or partial assignment, can make no difference, for they depend upon the same principle. And the views taken by this court in *Deckard v. Case*, are borne out fully in *Robinson v. Crowder*, 4 McCord, 519 [17 Am. Dec. 762]; *Mills v. Barber*, 4 Day, 428, and *Hodges v. Harris*, 6 Pick. 360.

But is an assignment, which stipulates for a release, valid without containing a transfer of the separate estate of each of the partners? And we are of opinion it is not. The creditors have, under such circumstances, a right to require a transfer of all the property liable to their debts; otherwise they may refuse to release, without losing their recourse to the property of the debtor; for so far as regards the creditors who do not come into the terms prescribed by the deed, it remains, notwithstanding the assignment, the property of the debtor. It is unreasonable to require the creditor to release his debt, unless upon the unconditional surrender of the whole property of the debtor, whether it consists of partnership effects or of the separate individual property. And this is the principle clearly asserted in *McClurg v. Lecky*, 3 Penn. 83 [23 Am. Dec. 64]; *Passmore v. Eldridge*, 12 Serg. & R. 201; *Adlum v. Yard*, 1 Rawle, 163 [18 Am. Dec. 608]; *Johnston's Heirs v. Harvey*, 2 Penn. 92 [21 Am. Dec. 426]; and *McAllister v. Marshall*, 6 Binn. 338 [6 Am. Dec. 458]. A debtor can not make a reservation at the expense of his creditors, of any part of his income or property, for his own benefit, nor can he stipulate for any advantage either to himself or family. It would be in vain to make these decisions, if in the case of partnerships each partner could withhold his separate estate from his creditors. If he can not reserve or stipulate for any advantage to himself or family, for the same reason he can not be permitted to withhold his separate estate from his creditors, and at the same time exact from them an uncondi-

tional release. True, it may not appear affirmatively that the partner, who neglected or refused to execute the deed, had any separate property; but this is totally immaterial, as it would not, in our judgment, help the assignment, even if it should subsequently appear that the debtor, contrary to the fact in ninety-nine cases out of a hundred, was entirely destitute of any estate whatever. It is an indispensable condition to the validity of an assignment of an insolvent debtor, that the deed itself should contain a transfer of all his property, whether belonging to the firm or to each partner in his separate capacity. If on inspection of the deed the creditors observe that it is defective in that essential particular, they may refuse to execute a release, and are not bound to investigate the fact whether the partners have or have not separate estate. They may rely on the common-sense presumption that they have some separate property, and it would be unreasonable to require them to go further. To suffer insolvent debtors to omit such a transfer, would lead to great frauds, which even now, with every care and circumspection, it is so difficult to prevent. In truth, under our imperfect system, guard as we may, creditors are nearly if not quite at the mercy of their debtors. It operates as a means of coercion on them, with every advantage on the side of a fraudulent debtor; and this would be much increased if we should tolerate assignments, the direct tendency of which would be a temptation to withhold valuable estates from the grasp of creditors.

But this is not only true in principle, but we have the benefit of a direct decision on the point. The creditors, as is said in *Thomas v. Jenks*, 5 Rawle, 226, are entitled to the benefit of the whole estate, of which they are not to be deprived by an arrangement which would impose upon them the necessity of resorting to a part of it in exclusion of the rest. The very imposition of a choice, which might prove unfortunate, would be an exposure of them to a peril which they are not bound to encounter. An assignment, therefore, that would present but a part of the effects to the creditors, and refuse the rest, is necessarily fraudulent, inasmuch as it might be a means to extort an unfair advantage. Now an assignment of partnership effects only is a partial one; and although in the case cited, it appeared affirmatively that the debtor had separate estate, yet the cause did not turn upon that point, but upon the broad principle that the creditor had a right to an assignment embracing in its terms clearly and explicitly as well the separate as the joint property of every member of the firm. And this surely is im-

posing no hardship on the debtors; for if they have separate estate, the creditors are entitled to the benefit of it: if they have none, the deed is so far inoperative. The creditors have a right to the chance of after-discovered property, of which it may be possible the debtors at the time of the execution of the deed were ignorant. This construction has this great recommendation in my mind, that it may in many cases prevent debtors from attempting to impose onerous conditions on creditors, taking advantage of the perilous situation in which they may place them, who may for this reason only, be constrained to take part rather than run the risk of losing their whole debt.

We see nothing wrong in that part of the deed which, in order to facilitate and hasten the object and purposes of the assignment, gives full power to assignees to appoint and employ, according to their discretion, one or more agents or attorneys under them, with full or limited powers, and the same at pleasure to dismiss and revoke. There is nothing more in this clause than what is usually contained in every letter of attorney. And in this case such a provision was absolutely necessary, as it will be literally impossible for the assignees to give their personal attention to the collection of the numerous debts owing the firm in different parts of the United States. Indeed from necessity the assignees would have the same authority, even without any express power in the deed. If the assignees exercise their discretion improperly, as is apprehended, they will subject themselves to personal liability. Nor do we see anything exceptional in exempting the assignees from liability for any effects that shall not come to their hands, or any losses, insolvencies, or defaults that shall happen in the execution of the trust, either in the sale of the goods, collection of debts, or misconduct of agents or attorneys, unless in cases of willful neglect of duty or want of proper care, diligence, and fidelity on the part of the assignees. As I construe this clause, the assignees can claim no other exemption they would not have been entitled to without it. They are liable for want of care, diligence, and fidelity, and this would be the extent of their responsibility upon the general principle of principal and agent. They would not, at common law, be answerable for the acts of their agents where proper care was taken in their selection, unless there was an omission of ordinary diligence on the part of the assignees in compelling them to perform their duty. So also, it would be unjust to charge them with property which never came to their hands, unless it appeared that it might have

been reduced into possession and was not so in consequence of their supineness and neglect.

Neither do we see any difficulty in the way of the assignees, arising from the fact that persons who reside in the United States are allowed but three months, whereas those who reside out of the United States are allowed nine months to execute a release. Such a discrimination is but just, as it gives every creditor a sufficient time to examine the assignment, inquire as to the assets of the debtor, comply with its requisitions, and thereby entitle himself to a participation in the fund. A creditor should decide on the expediency and justice of releasing his debt, with a view to that debt, the conduct of the debtor, the amount of his assets, and not with a reference to the probable action of other creditors.

Judgment reversed, and a *venire de novo* awarded.

ASSIGNMENT EXECUTED BY ONE OF THE PARTNERS in the firm name is good, it appearing that both partners acknowledged the instrument: *Pike v. Bacon*, 38 Am. Dec. 259; *Bowen v. Clark*, 1 Biss. 134, citing the principal case.

RESERVATION INVALIDATES ASSIGNMENT: See note to *Pike v. Bacon*, 38 Am. Dec. 259, and the cases there collected; *Johns v. Bolton*, 12 Pa. St. 343, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Forbes v. Scannell*, 13 Cal. 289, to the point that one partner can transfer the whole of the partnership property; in *Grier v. Hood*, 25 Pa. St. 433, to the point that one partner may assign the whole of the partnership property for a *bona fide* partnership purpose; in *Heckman v. Messenger*, 49 Id. 473, to the point that an assignment by partners stipulating for a release, is not valid without containing a transfer of the separate estate of each partner; in *Jones v. Horner*, 60 Id. 218, as a case in which a writing under seal, made under parol authority, was sustained; and in *Schmertz v. Shreeve*, 62 Id. 460, to the point that, by the execution of a contract, consummated by delivery, the property is transferred to the assignees, and the assignment is not invalidated by the fact that the instrument is under the seal of one only of the partners.

JOHNSON v. HART.

[6 WATTS AND SHERGANT, 319.]

GRANT OF LAND TO A HUSBAND AND WIFE AND TO A THIRD PERSON, and their heirs, as tenants in common and not as joint tenants, conveys one moiety to the husband and wife, and the other moiety to the third person.

EJECTMENT brought by Lydia Hart against Sarah S. Johnson and the children of John Hart, deceased, to recover the difference between one third and one half of certain premises conveyed by Mrs. De Brahm to Mrs. H. Speakman and John Hart and Lydia his wife, to hold to them and their heirs and assigns

as tenants in common, and not as joint tenants. Judgment was entered for the plaintiff, on a case stated, for one half of the premises. The other facts sufficiently appear from the opinion.

Williams, for the plaintiff in error.

Price, *contra*.

By Court, KENNEDY, J. The only question raised in this case is whether under the deed from Mary de Brahm to Hannah Speakman and John Hart and Lydia his wife, Hannah Speakman took an undivided moiety of the estate thereby conveyed or only an undivided third part thereof; or, in other words, whether John Hart and Lydia his wife did not each take an equal undivided third part of the same as tenants in common, or only an undivided moiety of the whole, to be held by them jointly as tenants in common with Hannah Speakman. Had the estate been granted to them to be held as joint tenants and not as tenants in common, it would, according to all the authorities on the subject, be quite clear that Hart and his wife would only have taken an undivided moiety of the whole, and Hannah Speakman the remaining moiety. But it is contended that as the estate was granted to them to hold the same as tenants in common and not as joint tenants, each of the three, therefore, in order to carry into effect fully the meaning of the words of the *habendum*, must be considered as having taken an equal undivided third part thereof. And in support of this Mr. Preston in his first volume on estates, p. 132, has been cited, where he says: "In point of fact and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly where lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons will do." And Mr. Preston, to sustain what he has thus said, refers to Co. Lit. 187 b, where Lord Coke says: "If a man make a lease to A. and to baron and *feme*, viz., to A. for life, to the husband in tail, and to the *feme* for years, in this case it is said that each of them hath a third in respect to the severalty of their estates." Then Mr. Preston proceeds to say: "Also when a grant is made to a husband and his wife and a third person as tenants in common, each of these three will have a distinct and separate interest in and tenancy of a third part."

Now although it may well be in the case mentioned by Lord Coke, that the husband and wife would each take a third, as a

separate and distinct estate is given to each of them severally in express terms, so that if they take at all consistently with the terms of the grant, it must be a several and not a joint interest; but in the case put by Mr. Preston, the same meaning does not necessarily apply; for to many purposes, if not generally, husband and wife are regarded as one person only in law; and as the case in its terms does not preclude this idea of unity, they may be considered as taking a joint interest in an undivided moiety of the whole, and as holding the same as tenants in common with the third person, who has and holds the other moiety also as tenant in common.

Hence, according to Littleton, sec. 291, if a joint estate be made of land to husband and wife and to a third person, the husband and wife have but a moiety in law, and the third person the other moiety, because the husband and wife are but one person in law. Bracton saith: *Vir et uxor sunt quasi unica persona, quia caro una et sanguis unus*: Co. Lit. 187 b. "And therefore," says Judge Blackstone, in the second volume of his commentaries, p. 182, "if an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law, they can not take the estate by moieties, but both are seised of the entirety *per tout et non per my*; the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." And in a case before Lord Keeper North, Skin. 182, A. B., having three nieces, one of whom had a husband, bequeathed a legacy to the husband and wife and the other two equally; and held that the husband and wife took one third only of the legacy, and that the remaining two nieces took each a third thereof; because, as the lord keeper said, the husband and wife took only as one person, according to the rule of the common law. So in *Barber v. Harris*, 15 Wend. 615, where by a deed of settlement, the grant was to a husband and wife and to six of their children, naming them, and to such other, etc., to hold as tenants in common, it was ruled, that the husband and wife took only as one person, notwithstanding the estate was granted to them to be held in common and not jointly.

It would therefore seem, according to the weight of authority and opinion too, that John Hart and Lydia his wife, took only a moiety of the estate conveyed by the deed from Mary de Brahm, and not each one third thereof, as contended by the

counsel for the plaintiff. This construction also appears to be more consonant to the intention of the parties, as indicated by the form of the expression used, both in the premises and the *habendum* of the deed, for the purpose of describing or designating the grantees, which is as follows, viz.: "Hannah Speakman of, etc., and John Hart of, etc., and Lydia his wife, of the other part;" thus naming and describing them in the same manner precisely as if it had been intended to make Hart and his wife take as one person only. Had it been intended to make them take as two distinct and individual persons, such intention would have been better and more clearly expressed by having omitted the conjunction "and," inserted immediately before the name of Hart, after naming Hannah Speakman. Then it would have read: "Hannah Speakman of, etc., John Hart of, etc., and Lydia, his wife, etc." But it is not necessary to say here that this change, had it been observed, would have been sufficient to have given to Hart and his wife each one third of the estate, as language showing such design beyond all question or doubt, could have been employed, had the parties so intended it. It is enough to say that the language of the deed does not show it clearly, and hence we are of opinion that Hart and his wife took only a moiety of the estate conveyed, and that Hannah Speakman took the other moiety thereof.

Judgment affirmed.

CITED in *Stuckey v. Keefe*, 26 Pa. St. 399, in *French v. Mehan*, 56 Id. 288, and in *Gillon v. Dixon*, 65 Id. 398, to the point that a conveyance to husband and wife creates an estate, the whole of which continues in the survivor after the death of one of them.

SCOTT v. WELLS.

[6 WATTS AND SERGEANT, 357.]

ABSOLUTE DELIVERY OF CHATTEL PURSUANT TO BARGAIN PERFECT, or capable of being made so by reference to something else, or to an arbiter, vests the ownership in the purchaser. And therefore, a sale of a raft of boards at so much per thousand feet, and delivery thereof to the buyer, changes the property, although the number of feet contained therein remains to be ascertained.

WHERE CHATTEL HAS BEEN UNCONDITIONALLY SOLD AND DELIVERED, no subsequent negotiations in reference thereto, that afterwards fail, can alter the terms of the sale or affect the title of the property.

AGENT TO SELL CHATTEL MAY BE WITNESS FOR THE OWNER in an action for the price thereof, unless it be proved that he is liable for negligence or misfeasance, and without such proof the law presumes against his negligence or misfeasance.

EXPOSURE TO POSSIBILITY OF ACTION IS A CONTINGENT INTEREST, which goes only to the credibility of a witness.

ASSUMPSIT, by Wells against Scott, in which a verdict and judgment were rendered for plaintiff. The other facts are sufficiently stated in the opinion.

L. A. Scott, for the plaintiff in error.

J. M. Read, *contra*.

By Court, GIBSON, C. J. The material question is, whether the property passed by the sale and delivery in the first instance. The facts were not contested. Eldred, the vendor's agent, sold a raft of boards to Tustin, the purchaser's agent, at a certain rate the thousand feet, and delivered it to a person employed by the latter to take it, at the purchaser's expense and risk, from Richmond, on the Delaware, to a place on the Schuylkill, where it was afterwards moored. The delivery was unconditional, pursuant to the contract, and complete: why, then, did it not pass the property and put it at the purchaser's risk? Because, say the purchaser's counsel, the number of feet contained, or the sum total of the price, was not settled by the terms of the contract; and the consequence attempted is, that the sale was imperfect in its members. Had there been no delivery, or a conditional one, the purchaser would not, perhaps, have been bound till the number of feet and entire price had been ascertained; but the parties evinced, by taking the last step, that nothing remained to be done in order to perfect the contract.

If I deliver a chattel in execution of an agreement to sell it in terms to be fixed subsequently, the ownership and risk of the property doubtless remain with me in the mean time; but such delivery is conditional, and after an ineffectual effort to perfect the sale, no delivery at all. On the other hand, it is a rule, perhaps without exception, that whenever there has been an absolute delivery pursuant to a bargain perfect in its members, or capable of being made so by reference to something else than supplemental conditions by the parties, or an arbiter appointed by them, the ownership of the property is vested by it. I grant that a sale may be fatally defective in its members; and that, by the civil as well as the common law, the specification of a price is necessary to constitute it. But there is abundant authority to show that it may be supplied by arbitrament, where there is a provision in the contract for it; and why not by calculation where the contract furnishes a basis for it? Surely, the price

is certain enough when the sum of it can be obtained by computation. For instance, I sell my fat bullocks grazing in a particular field, at so much the head; there are five of them, but the number is not specified in the contract; they are delivered and driven away, but rush over a precipice and break their necks: surely it will not be said that I am to lose the price of them, because the aggregate amount of it or the number was not specified by the terms of the bargain. Yet the principle is necessarily the same, whether the number be five or five hundred. But I would be bound to bear the loss, were the number, however inconsiderable, determinable by a process provided in the contract. But where no such process is provided, may not a farmer sell his growing crop by the bushel, so as to change the ownership of it in the mean time, without fixing the quantity by an estimate before it is threshed? To sell by the bushel and fix the quantity would, in effect, be to sell for a round sum. Had, indeed, the agents of the parties before us made it a condition that the number of feet in the raft should be counted or estimated by a particular person, the sale would have been incomplete, and the property at the vendor's risk till that were done, insomuch that he might have passed the title to another, leaving the prior vendee to his action for a breach of the contract; but by the bargain actually made, the vendor sold just so many feet as the raft actually contained. There is no process pointed out to ascertain the number; and why may he not recover in proportion to the number ascertained by the evidence? A sale is imperfect only where it is left open for the addition of terms necessary to complete it, or where it is deficient in some indispensable ingredient which can not be supplied from an extrinsic source. But when possession is delivered pursuant to a contract, which contains no provision for additional terms, the parties evince, in a way not to be mistaken, that they suppose the bargain to be consummated. Even where actual possession has not been taken, the ownership and risk pass by the contract, if nothing remains to be done to the property by the vendor, such as counting, measuring, weighing, or filling up, to ascertain the number, quantity, or weight. Thus, in *Rugg v. Minell*, 11 East, 210, turpentine had been sold at so much the hundred-weight, in casks, to be taken at the marked quantity, except two, out of which the others were to be filled up before delivery; and those two were sold as containing indefinite quantities. The buyer employed a person to do the filling, but before he completed it, the warehouse, with its contents, was de-

stroyed by fire; and it was held that the property in those filled up had passed to the buyers, because nothing remained to be done to them by the vendors. Now the number of them, like the number of feet in this raft, could be ascertained only by extrinsic proof; and the case, therefore, is in point.

In perfect consistence with it is *Zagury v. Furnell*, 2 Camp. 240, in which a sale of goat-skins by the bale, containing a specified number, was held not to pass the property, because the usage of the trade, which was consequently a part of the contract, made it the duty of the seller to count the skins in each bale before they were delivered. So in *Hanson v. Meyer*, 6 East, 614, an agreement to sell all the vendor's starch in a particular warehouse, at so much the hundred-weight, the number of hundreds to be ascertained before delivery, did not presently pass the ownership. There is no lack of authority for the principle, that while anything remains to be done by the terms of the contract, to ascertain the entire price, the property remains at the risk of the vendor; and in *Withers v. Lyss*, 4 Campb. 237, the sale of an unascertained quantity of rosin in a particular warehouse, not taken away but requested to be kept in the names and at the disposal of the purchasers, was held not to have been completely delivered; but it certainly would have been otherwise had the actual custody of it been changed. In that event the sale would have been perfect, provided the quantity could have been ascertained by proof. In the case before us, the raft was actually delivered; and, in the absence of stipulation to the contrary, the delivery evinced that no more was to be done by the seller. Had he been unable to prove the number of feet which were contained in it, the sale would have been incomplete, and he could not have recovered. As he was able to satisfy the jury on that head, we must take it that the title passed to the vendee. Did the subsequent transactions revest it?

The jury were left to judge of the authority given to the agents as a question of fact; and as there was evidence to found a conclusion that their powers were general, we must treat the case as if the fact were so; and we must say that Eldred was competent, with the assent of the other party, to rescind the sale, revest the title, and make a conditional sale to the same vendee on terms which would leave the property at his principal's risk till the conditions were performed. Was that done?

It certainly was not intended. When he first met Scott, the purchaser, there was no proposal on either side to recede from the bargain or alter its terms. On the contrary, Scott expressly

ratified what had been done, and in addition, proposed to fix the number of feet by an estimate, to which Eldred acceded, and a day was appointed to meet at the raft and make it. This new agreement, it will be remarked, was not only an independent but a conditional one, and being itself imperfect, was of no force, being unexecuted. At the day appointed, Eldred and Tustin came, and met, not Scott, but a person on his part, who said that Scott would attend; but he came not, and nothing was done. Eldred then sought him, found him, and agreed with him to have the raft taken out of the water and counted at a day named. Eldred again attended and Scott did not, so that the second agreement turned out to be as abortive as the first, and both became as inoperative as if they had not been made. Moreover, it is obvious that neither of them was intended to impair or alter the sale. The object, a distinct and independent one, was to relieve the purchaser from the alternative of taking the agent's word for the number of the feet, or taking the trouble to ascertain it for himself. To hold that this turned the previous absolute sale into a conditional one, out of which the buyer could creep by refusing to co-operate in what was further to be done, and thus leave the property on the vendor's hands at a place remote from the market, would be not only unreasonable but inconsistent with the evident purpose of the parties.

As to the declarations of Scott, on the one hand, that he had once considered himself the owner of the raft, and the consent of Eldred to remove it to Harding's landing, on the other, it is enough to say that these, though indicative of the understanding of the contract by the parties, were not conclusive of the title, and that they were properly left to the jury. What is conclusive of it, however, is, that the terms of the sale were unconditional and sufficiently certain to pass the property in the first instance; that there was no evidence of an act done to rescind or alter it, and that when the subsequent negotiations failed, they left the contract where they found it.

It is impossible to imagine an objection to the competency of Eldred as a witness. The suggestion is, that he may have incurred liability to his principal for negligence or misfeasance, from which he would be exonerated by a recovery in this action; the answer to which is, that there was no evidence of negligence or misfeasance, and that, in the absence of proof of it, the law presumes against it. Besides, exposure to the possibility of an action is one of those contingent interests which go only to credibility. Such were the principles that ruled a similar point

in *McCreedy v. The Schuylkill Navigation Co.*, 3 Whart. 424, and which rule the point before us.

Judgment affirmed.

DELIVERY, WHAT SUFFICIENT TO PASS TITLE TO CHATELS: See *Jewett v. Lincoln*, 31 Am. Dec. 36, note 39, where other cases in this series are collected.

THE PRINCIPAL CASE IS CITED in *Dennis v. Alexander*, 3 Pa. St. 51, to the point, that it is not law that the right of property can not pass so long as the quantity of the thing sold remains to be ascertained; in *Hutchinson v. Hunter*, 7 Id. 142, to the point, that parties to a contract of sale must be agreed as to the specific goods on which the contract is to attach, before there can be a bargain and sale; in *Weaver v. Wood*, 9 Id. 223, and in *Winslow v. Leonard*, 24 Id. 16, to the point, that the terms of a sale are certain enough, where the price of the thing sold can be ascertained by computation; in *Golden v. Ogden*, 15 Id. 532, to the point, that the property passes, although the things sold are to be counted before being taken away by the purchaser; in *Lester v. McDowell*, 18 Id. 95, *Thompson v. Franks*, 37 Id. 329, and *Bigley v. Risher*, 63 Id. 155, to the point, that while anything remains to be done, by the terms of the contract, to ascertain the entire price, the property remains that of the vendor, and at his risk; and in *Williams v. Getty*, 31 Id. 464, to the point, that a general agent to make sales is competent to rescind a contract of sale, with the consent of the other party.

DREXEL v. MAN.

[6 WATTS AND BERGHEAT, 286.]

THE SUPREME COURT CAN NOT ISSUE MANDAMUS to the district court of the city and county of Philadelphia, to compel the judge of said court to sign a bill of exceptions.

ON the petition and affidavit of Drexel, the plaintiff in error, this court granted a rule upon Judge Stroud, of the district court of the city and county of Philadelphia, to show cause why a mandamus should not issue to him, commanding him to sign the bill of exceptions tendered to him by said Drexel's counsel, containing a general exception to the whole of the judge's charge, and the charge itself in full. On the return of the rule, the learned judge put in an answer, in which he alleged that, according to law, the pretended bill of exceptions, mentioned in the petition, ought not to have been allowed by him, but on the contrary, it was his duty to refuse to seal the same.

Jack, for the rule.

By Court, GIBSON, C. J. It is strange that the writ of mandamus should still be supposed to give remedy in a case like the present. It is true that it does so in New York, as appears by *The People v. The Judges of Washington County*, 2 Cai. 97,

the secret of which is, that the matter is regulated there by a particular statute of the state. I have seen no case, English or American, which indicates that it may be used for the purpose as a prerogative writ. In England it certainly may not; for we are told by Lord Coke, 2 Inst. 426, that the proper remedy is a writ specially framed on the statute W. 2; and accordingly we find a form for it in the register, page 182, setting forth the circumstances of the case, and commanding the judges, if they be true, to affix their seals to the bill. If they return that they are untrue, the superior court proceeds no further, but leaves the complainant to his action for a false return, in which their truth is tried according to the course of the common law. Such a remedy certainly resembles an alternative mandamus; still it is not a prerogative writ, but specific, grounded on a statute. That no instance of its use is to be found, was said by counsel in *Bridgman v. Holt*, Show. P. C. 122, to be because no English judge had ever refused to allow a proper exception. However that may be, recourse might certainly be had to it there, and a writ might be framed in conformity to it here. But if we have no precedent for an actual recourse to it, neither have we a precedent for a successful recourse to a mandamus as a substitute for it. In place of that, it was very seriously doubted in *The Commonwealth v. The Judges of the Common Pleas*, 3 Binn. 273; S. C., 1 Serg. & R. 187; *Morris v. Buckley*, 8 Id. 211; and in *Kolb's Case*, 4 Watts, 154, whether a mandamus lies to a county court for any purpose whatever. The point has not been decided, nor is it necessary to decide it now; for it has never been supposed that it lies to compel performance of a judicial function in a particular way. Thus it was held in the first of the cases just quoted, that it lies not to compel the reception of an appeal; or in the second, the admission of an attorney to the bar. So far was the principle carried in *Commonwealth ex rel. Griffith v. Cochran*, 5 Binn. 87, that it was applied to the function of an executive officer acting in a deliberative capacity. Is not the sealing of a bill of exceptions a deliberate act? The exception is written by the party who alleges it, and the fact is judged of by him who, of all others, is most competent to determine whether it is truly written; because his eyes and ears have taken in the whole transaction. And yet counsel come here for the interference of a court which knows nothing of the matter but what it gleans from affidavits, to compel him to act in a particular way, though at his peril, on an assumption of facts and circumstances which he may know to be unfounded.

But that is not all. We have used the mandamus only as a process in the last resort: never where there was a specific remedy. Thus it was refused in *The Commonwealth v. Rosseter*, 2 Binn. 362 [4 Am. Dec. 451], where the object was to restore the relator to a pew in an incorporated church, because he had a remedy by action for a disturbance; and in *The Commonwealth v. The Canal Commissioners*, 2 Pen. & W. 518, it was said that though the writ is grantable of common right, yet it is only where it is necessary to prevent a failure of justice. The principle is more emphatically asserted by Lord Hardwicke, in *The King v. Wheeler*, Cas. temp. H. 99, in saying: "The reason why we grant these writs is to prevent a failure of justice, and for the execution of the common law or of some statute, or of the king's charter, and never as a private remedy to the party, except on the statute of Anne, and that stands on another footing: nay, the old cases went so far as to refuse a *mandamus* in all cases where an assize lay; and though the court is not so strict nowadays, yet it shows in what light these writs are considered." Now the writ grounded on the statute of W. 2, would be much more manageable than an assize. Again, in *The Commonwealth v. The Commissioners of Philadelphia County*, 5 Rawle, 75, the court would not award a mandamus to settle the validity of an election, but put the parties to a *quo warranto* in order to try the contested facts by a jury. As, then, there is a specific remedy for the case before us, by the form of writ in the register, the rule might be discharged for that reason alone. But we are bound to take the facts returned to be incontrovertible, and the judge has returned what would prevent us from awarding this extraordinary writ, were we otherwise competent in such a case to do so.

Rule discharged.

CITED in *Conrow v. Schloss*, 55 Pa. St. 35, to the point that mandamus can not issue from the supreme court to the district court, to compel the judge thereof to sign a bill of exceptions; and in *Wolf v. United Daughters of America*, 1 Phila. 375, to the point that the writ of mandamus is a high prerogative writ, and is confined to cases of a public nature.

TASSEY v. CHURCH.

[6 WATTS AND SERGEANT, 465.]

JUDGMENT OBTAINED BY ONE FIRM AGAINST ANOTHER FIRM, constituted in part of the same members, can not be enforced by levy upon the separate property of an individual member of the defendant firm.

Assumpsit for money had and received, and for an account, brought by Samuel Church, James T. McVay, and Franklin Gordon, trading in the name of McVay & Gordon, against John Tassey and said Samuel Church, trading in the name of Tassey & Church. There was a judgment for the plaintiffs, which was subsequently affirmed by the supreme court on an appeal by Tassey. Tassey then filed a bill on the chancery side of the district court, alleging the indebtedness of Church to Tassey & Church, and McVay & Gordon's indebtedness to Church to a much larger amount than the sum of the judgment and costs in the suit at law, and praying for an injunction. Afterwards, on the law side of the court, the plaintiffs in the judgment issued a *fi. fa.* The sheriff returned *nulla bona* as to the joint property of Tassey & Church, and a levy on the personal property of Tassey. The court below, on motion of Tassey, set aside the levy.

Loomis and Biddle, for the plaintiffs in error.

Dunlop, contra.

By Court, GIBSON, C. J. The argument at the bar has taken a wider range than the point before us, which involves no more than the levy of the execution on the separate estate of Tassey, one of the defendants and a partner of the debtor firm. The bill on the equity side of the court is no part of the record; and though it is spread on the paper book, it is to have no influence on the question raised by the assignment of error, further than the facts charged may illustrate the injustice and inconvenience of the method attempted in this instance to carry out the remedy, as it is called, provided by the statute, which allows an action to be sustained between distinct firms constituted in part of the same members, some of them standing on both sides of the record as both plaintiff and defendant. The statute was enacted, it is said, to provide for a particular case. It certainly went through the legislature without much consideration of its effect, or the difficulties that would be found to lie in the way of its execution; and it shows how inevitably the administration of justice is plunged into disorder by legislative tampering with its machinery. The action authorized by the statute may readily be conducted to judgment; but how it could be thought that a writ of execution might be applied to the persons or the separate estate of the individuals who compose the debtor firm, without doing injustice to some of them, or producing some whimsical absurdity, it would require all the ingenuity of the

person who framed the act to explain. It was enacted before the abolition of imprisonment for debt; and to have allowed the judgment authorized by it the full common law effect, would have subjected one of the defendants to arrest on his own execution, but still with the means of regaining his liberty by ordering, in his capacity of plaintiff, his body to be set at large in its capacity of defendant: an operation that would have discharged the debt. Yet a writ of *capias ad satisfaciendum* could have been issued only against both; and the sheriff would have been as much bound by it to arrest the one as the other. And the same absurdity would appear in the seizure of the separate estate of a party plaintiff in satisfaction of his own execution. It might be avoided, indeed, by directing the sheriff to seize the property of the other defendant; which though it would be less absurd, would be more unjust. Say that only a moiety of the debt shall be thus levied, and you mitigate the injury, but do not prevent it; for the ultimate justice of the case would depend not on the apparent duty of equal contribution in the first instance, but on the balance of the partnership accounts, which a court of law is incompetent to ascertain; and if the co-defendant were insolvent, as Church is alleged to be, an action or bill against him for contribution would be of little use. It may be said that as a partner's separate estate is liable at law for the joint debts in an action by a stranger, the misfortune of being compelled by the insolvency of his copartner to bear the whole burden, was sometimes felt before the statute in question was enacted. But the solvent partner would not be bound in equity to pay the part of the money which would be coming to the insolvent partner himself; and he would not be bound to pay any part of it whatever, if, as charged in Tassey's bill as to Church, his co-defendant owed him a sum equal to the amount of the judgment, and were a creditor of the plaintiff firm to the same amount.

What effect, then, must we give to such a judgment? Its office is obviously to settle the general question of indebtedness between firm and firm, and it was doubtless intended to be followed by execution; but when we subject the joint effects to seizure, we do perhaps all that was contemplated. That the action was considered as a proceeding between firms as independent bodies having an existence distinct from the individuals who compose them, seems clear; for the solecism of an action brought by a man against himself for purposes of self-execution, could scarce have been entertained by the legislature. The Roman law and the codes that have sprung from it, treat a firm as a

quasi corporation, and allow it to sustain the relations of debtor and creditor with the individuals who compose it, as well as to sue them and be sued by them; and why may we not carry the principle the same length, by holding that where a judgment is between firm and firm, and not between man and man, the joint property of the debtor firm, like the property of a corporation, is alone liable to execution? It is true the Roman law does not thus dispose of the difficulty; and I am sorry that we are hindered by the stiffness of common law forms from choosing the course pointed out by it; for it is impossible to satisfy the wants of justice between partners by any management of an execution, or indeed by any common law process whatever. The crude and unwieldy action of account render has been so long disused that it is imperfectly understood; and the attempt of our legislature to adapt it to modern use has not made it much better. Happily the chancery powers which have been vested in the judiciary will make the statute before us a dead letter, where there are not joint effects; and where it happens, as it sometimes must, that execution even of the partnership property would work injustice between defendants in circumstances like the present, the partner jeopardized will arrest it by a bill for an injunction and a settlement of the accounts.

Our decision of the point before us is of little importance to the present parties; for were we to restore the execution to its activity, the district court would be bound to suspend it by such an injunction. The facts charged by the bill in that court would demand it; for if Church is insolvent, and not only indebted to his co-defendant but a creditor of his co-plaintiff, it would be inequitable to let the execution go on. I say this not to forestall the opinion of the able court which has the matter in charge, but to show the injustice of letting the money be recovered of one of the partners at law. The act might as well be expunged from the statute book, since such matters must eventually find their way into equity. We are of opinion, therefore, that the levy was properly set aside; and that Tassey's separate property can not be seized till the accounts are taken and the equities settled between the defendants.

Order setting aside the levy affirmed.

CITED in *Laughlin v. Lorenz*, 48 Pa. St. 285, and in *Allen v. Erie City Bank*, 57 Id. 140, to the point that a judgment recovered under the act of 1838, which authorizes one firm to sue another where there is a partner common to both, can not be levied on the separate estate of one partner.

SPEISE v. MCCOY.

[6 WAITE AND SHERMAN, 486.]

MONEY VOLUNTARILY PAID UNDER VOID CONTRACT can not be recovered back. And therefore, the creditor of one who lost money on an election bet and paid it over to the loser, can not recover it back, by means of a foreign attachment.

FOREIGN attachment, at the suit of Andrew McCoy against Ezekiel Sankey, in which John Speise was summoned as garnishee. The garnishee deposed that he had made a bet with said Sankey on the result of the election; that he won, and Sankey paid the money over to him before the attachment was served upon him. The court below rendered judgment against the garnishee.

Mahon, for the plaintiff in error.

Agnew, contra.

By Court, GIBSON, C. J. By the statute in force when this wager was made, the contract was illegal; but after it was executed by payment over, the money could not be recovered back, as was held in *McAllister v. Hoffman*, 16 Serg. & R. 147 [16 Am. Dec. 556], cited in the argument. But it is said that the court went, in that case, on the turpitude of the parties which affected them individually—an objection which does not lie to the plaintiff in this instance—and that, as the contract was null by the letter of the statute, repetition might be had of the money in the hands of the winner as the proper money of the loser. The court, however, objected to the action, not merely for the individual disability of the plaintiff, but for the impurity of the contract which had, from all time, prevented courts of justice from handling such a thing, or anything growing out of it. An executor or administrator of such a loser, would not be allowed to recover back money so paid even for the benefit of creditors; for it could not be told that the decedent's kindred or legatees would not share in the benefit also; and the same effect would be produced by sustaining an attachment in the loser's life-time, because he would be exonerated by it *pro tanto* from payment of a debt. What more easy than to elude his personal disability, if the difficulty consisted in that, by procuring a convenient creditor to pay himself out of the money in the winner's hands by the instrumentality of an attachment, and thus enable the loser to keep just so much in his pocket, which he would else be compelled to disburse? An attaching creditor's recovery would inevitably inure to the benefit of his debtor.

There is besides another principle to be met, which is decisive of the cause, independent of considerations that are personal to the parties. By permitting the money to pass into the hands of the winner, the loser voluntarily paid a debt which, though void as to its legal obligation, has the effect of preventing a recovery back. *Munt v. Stokes*, 4 T. R. 561, is in principle the case before us. That was an action to recover back money paid on a *respondencia* bond which was void by statute; and Lord Kenyon, having observed that the contract was *malum prohibitum*, and not *malum in se*, said: "But the ground on which I go is this, that there was no misrepresentation, or any improper conduct by the defendants, to extort the money from the plaintiffs; but the plaintiffs, knowing the whole transaction, and the law also, as they were bound to do, voluntarily paid it. There was nothing contrary to conscience in the defendants receiving the money, which they had advanced; the plaintiffs are therefore entitled neither in law nor equity to recover it back." Like the bond in that case, a wager on the event of an election is not *malum in se*, but *malum prohibitum*; and there is no more well-founded objection in morals to the receipt and retention of the money paid on the one of them than on the other, after the risk has been run which was the inducement to the contract. Now the bar to an action for the recovery of it back is not want of individual capacity to sue, but want of a cause of action. Still it is urged that such payment over is fraudulent as to creditors by 13 Eliz., c. 5, inasmuch as it is in effect a gift of the money. Supposing it to be a gift, as it is in effect, it follows not that it is within the purview of that statute, though the donee be not a child, provided the donor were not indebted at the time; and that the loser in this instance owed a shilling, is no part of the case. That we have not been disposed to follow out the stern interpretation put on the statutes of Elizabeth by the British judges, is manifest from the decision in *Lancaster v. Dolan*, 1 Rawle, 231 [18 Am. Dec. 625], that a voluntary conveyance is good against a subsequent purchaser with notice. Even those judges themselves evinced in their earlier decisions, a degree of indulgence to gifts against subsequent creditors, which they denied to gifts against subsequent purchasers; but Lord Hardwicke, it seems, pared it down till it reached no further than a family settlement by a father after children born; and perhaps the decisions of the English chancellors in regard to the distinction can scarce be reconciled. The difference between the two statutes in the tone of their construction is not very great; still it is

something, and as we have already relaxed it as to the one, it affords a stronger reason for relaxing it as to the other.

In a case like the present, where the importance of the property involved bears no proportion to the importance of the principle, I speak not without hesitation; but it seems to me that a gift of a chattel to a stranger by a person not indebted, unaccompanied by evidence of a design to become indebted, or any badge of fraud to deceive subsequent creditors, would not be within the true intent of the statute. Circumstances may have called for a severer construction in England, which do not exist here; and I am unable to see why a fowling-piece, a trinket, or anything else, presented by a gentleman of indisputable opulence to his friend, should be liable to execution for a bill subsequently run up by the donor with his butcher or his baker. There was no debt in the present case to be attached; and the garnishee is entitled to judgment.

Judgment of the court below reversed, and judgment here for the defendant.

PAYMENTS VOLUNTARILY MADE CAN NOT BE RECOVERED BACK: See *Stevens v. Head*, 31 Am. Dec. 617, note 619; *Feemster v. Markham*, 19 Id. 131, note 135; *Dickins v. Jones*, 27 Id. 483, note 489; *Waite v. Merrill*, 16 Id. 233; *Touro v. Cassin*, 9 Id. 680.

BINGHAM v. ROGERS.

[8 WATTS AND SERGEANT, 495.]

COMMON CARRIER MAY, BY SPECIAL CONTRACT, limit his common law liability.

ONE WHO SENDS GOODS BY A CARRIER MUST PROVE THEIR VALUE by other testimony than his own oath, in an action brought by him for their loss.

CASE brought by Rogers against Bingham and others, for negligence, whereby, as he alleged, he lost a trunk containing certain personal property. The plaintiff produced and proved the execution of the following receipt:

“Received of Messrs. Rogers & McDonald thirty-two dollars and fifty-one cents for two seats to Pittsburgh, and five hundred and forty-five pounds extra baggage, including one trunk already forwarded.

BINGHAM & BROTHERS,

Per M. Davis.

“Each passenger entitled to fifty pounds baggage free. All baggage at the risk of the owner.”

The trunk was lost. The jury found a verdict for the plaintiff

for five hundred and thirty-seven dollars and sixty cents. The other facts sufficiently appear from the opinion.

Wylie and Williams, for the plaintiff in error.

Darrah and Williams, *contra*.

By Court, HUSTON, J. Much of the law of this, and perhaps every country, is founded on the usages of the people, and those usages vary as the business changes, or as the legislature interferes to modify and prescribe rules for the regulation of business and contracts relating to business. The law relating to the liability of common carriers is very ancient, and is at least as old as the statutes of hue and cry, by which the vicinity was made liable for goods of which any person was robbed. These last are now obsolete or repealed. They were required by a state of barbarism and of sparse population, and by the fact that it was at least probable that many, if not all, in the neighborhood were concerned in the robbery, or partook of the spoils. In such a state of society it was not unreasonable to suppose common carriers might know something of the persons by whom they were robbed—might give notice to the robbers, and share in the plunder. The state of society, the close settlement of the country, the vicinity of populous towns, and the orderly life of the inhabitants of the country, have banished gangs of robbers pretty much. Still it remains the law that common carriers are liable for all losses not occasioned by the enemies of the country or the act of God.

In the process of time, stage-coaches for the carriage of passengers and their necessary clothing or baggage came into use, and the question of their liability, and to what extent, arose. These modes of conveyance had been unknown for centuries after the doctrine as to common carriers had been settled. There are intimations that if the owner is along, the care of his goods devolves on him and not on the owner of the vehicle. It, however, became understood that there was some responsibility on the coach-owners, and they endeavored to protect themselves by advertisements and notices. The effect of these was the subject of frequent discussion, and different judges *à priori* gave different opinions. Even when removed to the courts in bank, the decisions of the common pleas and king's bench did not always accord with each other. Perhaps they at length agreed that a notice in a gazette or hand-bill did not avail, unless on proof that it had been actually read by the owner of the goods. Acts of parliament were passed during the reign of George III., de-

fining and regulating the liability of stage-owners, and many decisions in the English reports are founded on these, though the act is not noticed in the opinions. At length it is apparent the danger was apprehended to the carrier and not from him. As the liability arose from the hire paid, it was provided that no person should recover beyond a certain sum, unless he gave notice of the value contained in his trunk.

It is admitted in *Hollister v. Nowlen*, 19 Wend. 246, 247 [32 Am. Dec. 455], that cases are found, from *Southcote's Case*, 4 Co. 84, down to *Nicholson v. Willan*, 5 East, 513, and even later, *Leeson v. Holt*, 1 Stark. 186, where courts have assumed it as law, that a special printed or written notice given to the person sending goods, may limit the liability of the stage-owner. The last act in England, passed in 1836, I believe, is referred to, and it is stated that, except as to the specified articles, it had brought the responsibility of stage-owners back to the common law as respects carriers. We quote acts of Parliament, not from the statute-book, but from extracts in reports. I have met with what purports to be the sixth section of that act, as follows: "Nothing in this act shall extend or be construed to extend in any wise to affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, and other parties, for the conveyance of goods and merchandise." This is not going back to common law. The ninth section provides, that though the passenger has stated that his trunk contains articles of a certain value, and paid a price for such value, yet if it is lost, the stage-owner shall not be liable beyond the articles and value which the owner shall prove by legal evidence. Nothing can more strongly show the idea of the legislature that there was some danger of the stage-owners being made to pay for what they never received, or more than the value of what they received. The case in New York urges strongly the example of that great mercantile nation as of weight here, though the act is not obligatory.

I come now to the decisions of this court. At a time when our rivers were obstructed by falls and rapids and rocks, there were few carriers. Several neighbors joined to build an ark or boat, to carry the produce of their own farms and some neighboring farmers down some of our rivers in times when there was high water. For a long time, it was not understood by the owners of boats or of goods that their liability was the same as that of carriers at common law: See *Gordon v. Little*, 8 Serg. & R. 533 [11 Am. Dec. 632]. At length rocks were removed, and the navigation rendered more safe, and there were more boats,

and more expertness and skill in those who navigated the rivers, and the common law doctrine came in; but I can well recollect the time on the Susquehanna, when a higher price was paid to boatmen who engaged against all accidents except the act of God. The common law doctrine is now generally understood, in courts and among boatmen, to apply. On the Mississippi and its large branches, insurance at an office is, however, common; perhaps because the boat-owners could not pay the amount of goods shipped. To come to cases of stage-owners and canals: In *Beckman v. Shouse*, 5 Rawle, 179 [28 Am. Dec. 653], it is said: "It seems to be settled, though many learned judges have expressed their regret, that carriers by land may by a special contract limit their responsibility, though not throw it entirely off, in case of gross negligence or fraud." See also, *Atwood v. The Reliance Co.*, 9 Watts, 89.

There is another point, of great and increasing importance in this case. The trunk alleged to have been delivered to the carrier contained no clothing, but so many guard-chains and rings, etc. In the article of agreement with the Bahia Steamboat Navigation Company, without stating its date or terms, or whether it had been completed or abandoned before the plaintiff left South America, or whether the company was ever organized or was broken, was one item sworn by the plaintiff to be worth two hundred and forty-two dollars. Without other evidence, it is not easy to say it was worth a cent. The brass model for a steam engine, called in the affidavit of the plaintiff a small brass model of an improved rotary engine, the object of which was to overcome the dead power of steam—his own invention—worth two hundred and fifty dollars, etc. We see and hear of so many improvements in steam engines, which please nobody but the inventor, and which are not feasible or practicable, that I would long hesitate to pay so dearly for any model never tried or approved by any but the inventor. Besides, if it was his own invention, he can have another made, and the brass and cost of workmanship is the only loss. It seems this man had been in Brazil, and last in France, but how long at either place, or when he left, is not stated. He engaged his passage in what the defendants call the emigrant line, and took a receipt. We are not aware of any rule or principle of law which requires or admits the application of different rules of evidence or principles of conduct, in the ordinary transactions of life, to one class of men, or men of one nation, from what are applied to all men in such situations. If a foreigner should sue for goods sold and delivered, he must prove the sale and delivery, as if he had been a

native; and in case of any contract made by him, he must prove it by legal testimony. Now if a merchant or other person send a box or boxes of goods by a carrier, he must prove the contract and value by some other testimony than his own oath. *Clark v. Spence*, 10 Watts, 336, states this expressly. In that case it was agreed that the party may by his own oath prove the clothes, and even personal ornaments contained in a trunk containing the clothing of a passenger. Perhaps where those clothes are set at a very high value, or the ornaments are very numerous and estimated at high prices, it may be found necessary to require some proof that the party alleging the loss actually possessed such articles of such price when at home, and neither sold them nor left them at home, or the place of his or her last residence. If an emigrant must bring proof of a parol contract before he can recover on it, we do not see why he can or should recover on the severest legal liability known to the law, without the ordinary legal proof that he possessed certain articles, and their value, and that he delivered articles of such value to the carrier.

If the plaintiff must in every other instance prove his case by legal evidence, we see no reason for extending the exceptions from necessity beyond those already established. Whether going on a trading journey or one of business, or traveling to the west with intention of settling permanently, the party must, to recover against a carrier, prove he had the articles of merchandise, tools of a trade, or other goods or chattels, not excepted by decided cases, and the value of them; and this whether he has always resided in this country or lately come from a foreign nation. And it is time that it was generally known and understood that if two parties make a contract and reduce it to writing, it binds both parties, at least so far as a construction has been put on such contracts by the tribunals of justice.

Judgment reversed, and a *venire de novo* awarded.

COMMON CARRIER MAY LIMIT HIS LIABILITY BY SPECIAL CONTRACT: *Atwood v. Reliance T. Co.*, 34 Am. Dec. 503, note 506, where other cases are collected; *Leonard v. Hendrickson*, 18 Pa. St. 43; *Dorr v. New Jersey S. N. Co.*, 11 N. Y. 492; *Mercantile Ins. Co. v. Chase*, 1 E. D. Smith, 139, all citing the principal case. See, also, note to *Cole v. Goodwin*, 32 Am. Dec. 497, where the subject is discussed at some length.

THE PRINCIPAL CASE IS CITED in *Laing v. Calder*, 8 Pa. St. 484; in *Camden & Amboy R. R. Co. v. Baldauf*, 16 Id. 77; *Farnham v. Camden & Amboy R. R. Co.*, 55 Id. 59; and in *Brown v. Eastern R. R. Co.*, 11 Cush. 99, to the point that a common carrier may limit his liability, by notice brought home to the shipper; and in *Rose v. Des Moines Valley R. R. Co.*, 39 Iowa, 249, to the point that a common carrier can not avoid liability for negligence.

PATTERSON v. STEWART.

[6 WATTS AND SHERBURN, 527].

MEASURE OF DAMAGES IN ACTION FOR BREACH OF COVENANT against incumbrances, is the amount of the purchase money, with interest thereon from the time when the vendee ceased to be in perception of the profits, actual or potential.

COVENANT by Stewart against Patterson. The facts appear from the opinion.

McCandless, for the plaintiff in error.

Metcalf, for the defendant in error.

By COURT. We think the principle of the district court right, and we adopt it. By the breach of a covenant against incumbrances, the purchase money becomes instantly revendicable, with interest, except for any time during which the purchaser may have been in the perception of profits, actual or potential, which could not be recovered from him. In this instance, though the covenant was broken at the sealing of the deed, the conveyance nevertheless vested the exclusive ownership in the purchaser till it was divested by the sale on the incumbrance, and to the profits, in the mean time, the incumbrancer could make no pretension. But as the purchaser's possession had been legal and not actual, it was extinguished by the sheriff's conveyance along with his seisin, of which it was an incident. From that time the use of the purchase money in the hands of the vendor was without an equivalent; and the original vendee became entitled to interest for it in the shape of damages.

Judgment affirmed.

MEASURE OF DAMAGES FOR BREACH OF COVENANT: See *Foot v. Burnet*, 36 Am. Dec. 90, note 94, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Cox v. Henry*, 32 Pa. St. 19, to the point that the consideration named in a deed is the best *prima facie* evidence of value; and in *Terry v. Drabenstadt*, 68 Id. 402, to the point that the value should be estimated by the consideration money paid to the covenantor.

CASES AT LAW
IN THE
COURTS OF APPEALS AND ERRORS
OF
SOUTH CAROLINA.

MARTIN *ads.* BOBO.

[1 SPEARS' LAW, 26.]

INDEPENDENT COVENANTS. — Where plaintiff takes a note for purchase money of lands, and defendant takes a penal bond that a lawful title be given him, which are wholly independent and disconnected, each has an action on his own security for the non-performance of the other party, and performance on one side is not a condition precedent to performance on the other.

DAMAGES. — Where plaintiff was owner of one third of land and her infant child the owner of two thirds, and an order of court had been made confirming her sale of the land, the vendee will not be entitled in an action for the purchase money to set up a discount for the infant's share.

ACTION on a note, for purchase money of lands sold to defendant by plaintiff, which were allotted herself and her infant child as their share of her deceased husband's real estate. Verdict for plaintiff. Defendant appealed upon the following among other grounds, viz.: that the court erred in deciding that defendant could not avail himself of want of title in the plaintiff, and that the bond for a lawful title could not be set up as a defense to the note sued upon.

Herndon, for the appellant.

Henry, *contra*.

EVANS, J. The defendant gave his note for the price of the land, payable at the end of twelve months; and took the plaintiff's penal bond, to make him "a lawful title, or cause it to be made," within the same period. If these stipulations

had all been in one instrument, it might be doubtful whether the plaintiff could recover without averring or proving performance, on her part; but where each party has taken his own security for the performance of the other party, there can be no pretense for saying the performance on one side is a condition precedent to the performance on the other, unless there be some express stipulation to that effect. Each party elects his own mode of coercing performance by the other. The plaintiff has taken a note, and the defendant a penal bond, which are wholly independent and disconnected with each other, and each has his action upon his own security for the non-performance by the other party.

The defendant contends further, that he is entitled to a deduction of two thirds of the price of the land, by way of discount, for the share of the plaintiff's infant child. There can be no doubt, that at the time of the sale, the plaintiff was the owner of only one third of the land. That she could not then make a title to the whole of the land could not have been unknown to the defendant, and was probably the reason why a bond was given. The defendant was the son-in-law of Barham Bobo, senior, and one of his executors; and besides this, the condition of the bond is, that she "shall make him a lawful title, or cause it to be made," within twelve months. The parties no doubt looked to the court of equity as the source from whence the title to the infant's share was to be derived. Whether the order of the court confirming the sale, and ordering a title to be made for the infant's share, was within the twelve months, was not stated at the trial; nor do I think it material. It is sufficient if a good title can now be made: *Johnson v. Purvis*, 1 Hill (S. C.), 322. The defendant has only to pay the money, and he will be entitled to have the infant's share conveyed to him. He has already the possession of the land; and there is no paramount title in another, from which he has sustained, or can sustain, any damage, which can be the subject of a discount in this action. The motion is dismissed.

RICHARDSON, O'NEALL, EARLE, BUTLER, and WARDLAW, JJ., concurred.

DEPENDENT COVENANTS: See cases in this series cited in note to *Howe v. Mitchell*, 35 Am. Dec. 231; also in note to *Babcock v. Wilson*, Id. 265; and see, for independent covenants, *Coleman v. Rowe*, 37 Id. 164, and *Sayre v. Craig*, Id. 756.

MOORE v. TURPIN ET AL.

[1 SPRANG'S LAW, 32.]

APPORTIONMENT OF RENT MAY BE MADE between landlord and purchaser at sheriff's sale, and such landlord can not collect rent accruing after the sale.

ASSUMPSIT. David Henning rented a storehouse and lot to Turpin and Powers, for one year, at annual rent of two hundred dollars. The coroner sold the premises, by virtue of sundry *feri facias* against Henning, to Dr. Irvine. Henning afterwards applied for the benefit of the prison bounds act, rendered in a schedule of his property, and assigned the same to the plaintiff, John Moore, who brought this action for the rent of the storehouse. One month of the year had elapsed before the sale. Verdict was given for the defendants.

Perry, for the plaintiff.

Choice, *contra*.

RICHARDSON, J. The general question of the case is, what did the coroner transfer to Dr. Irvine in selling to him the land of Henning? The answer is, he transferred the land, with all the rights annexed to it, according to the title of Henning; and to the same extent as if Henning had, himself, given a release and quitclaim of all his right and title to the purchaser and his heirs. Such a release would, of course, transfer the use of the land, personally, or by the means of tenants, according to the rules and meaning of estates in land. But it is supposed that, as Henning had, before the sale, leased the land to Turpin and Powers, the rent is still due to Henning for the term of the lease—that is, for the space of eleven months after the coroner's release to Dr. Irvine. The right of Turpin and Powers to keep possession for the term of their lease, can not be questioned. All property is sold, by the sheriff or coroner, subject to the rights of strangers. The defendant alone loses his dominion over it, because that is transferred to the purchaser, and, *cum onere*, assuredly. But the plaintiff's case assumes that Turpin and Powers may not only keep possession, but must pay their rent to their former landlord, Henning; first, because they had rented the land of him; and secondly, because the rent had been growing due to Henning for a month before the sale to Irvine, and therefore the court can not apportion the rent of the subsequent eleven months to Irvine.

If the first reason were to prevail, and such a consequence

were to follow, the purchaser of a landed estate with a numerous tenantry, might, with a little sagacity and much interestedness on the part of the former freeholder, be subject to the loss of both the use of the lands and the rents, for an indefinite time. But in that case, what would be the meaning of the rights and title released to him by his purchase? They would consist chiefly in the right to purchase of the tenants all their leases, or of the rents from the former freeholder. But the claim of the plaintiff, set up in the particular case, does not require the consideration of such extreme consequences. The proper question is, can the rent be apportioned between Irvine and Henning, by law? or is one of them entitled to the whole? The fact that Henning has received the month's rent growing due at the time of the coroner's sale, does not prove that he had a legal right to so much of the rent; and if Dr. Irvine had a right to the whole year's rent, it does not follow that we apportion the rent, by awarding to him the eleven months' rent to which he confines his demand, when he might have demanded twelve months' rent. But as the doctor confines his claim to eleven months only, this exposition of the ground taken in favor of Henning's rights, is made, only to show that the question of apportioning the rent arises from the assumption that Henning had a legal right to the rent, up to the sale; and that, if the doctor had a right to that very rent, by virtue of his purchase, he can not but have right to the subsequent rent of eleven months. For the argument, that if the doctor had a right to the whole rent, he is, of course, entitled to the part he demands, is not lessened by the fact that he does not require Turpin & Powers to pay him what they have already paid to Henning. It is easily conceived, then, that all the legal difficulty of dividing an entire contract, or of apportioning the rent, may be as well directed against the assumption of Henning's right to receive the first month's rent, as against the doctor's right to receive that of the subsequent eleven months. Strictly speaking, the verdict does no more than settle the point that Henning (or his assignee) is entitled to no more rent. What Dr. Irvine is entitled to may be yet an open question. But let it be granted, that Dr. Irvine has conceded the legal right of Henning to take the rent up to the sale—and this appears probable—still, may not the rent be apportioned between them? The doctrine of rent is technical, but rational, and rent is often apportioned. It is reserved to him from whom the land proceeded, or his representatives, and is due for the use of the land, says Chancellor Kent, 3d vol. 463, quoting the established authori-

ties. He says: "If the landlord dies before the rent becomes due, it goes to the heir." But if he dies after, it goes to the executor. This would indicate, by analogy, that in the instance before us, the whole year's rent should pass to the freeholder, at the time the rent became due. Again he says, from Rolle's Abr. and 1 Saund. 205: "If the tenant be evicted of a part of the land, the rent is apportionable:" 464. And here let me remark, that the difficulty of apportioning rent is on account of the tenant, not of the landlord. But in the case before us, the tenants are not only passive, between the claimants, but have taken a step towards the apportionment, by paying a part to Henning. Thus, then, the tenants have left the rent to be divided according to the rights of the successive freeholders, and present no objections of their own; while Henning has himself acceded to such partial payment of the rent, before it was due, under his lease to Turpin & Powers; or at least, he has credit for so much, upon their account against him; and the plaintiff's case assumes the fact.

But to return to the strict legal right to apportion rent among different freeholders. Chancellor Kent says, page 469: "Though it was a principle of the common law, that an entire contract could not be apportioned, yet the apportionment was, under certain circumstances, allowed by the common law, either on severance of the land, etc., or of the reversion." "A person has a right to sell the whole or a part of his reversionary interest," etc. "It may be necessary to divide his estate out on rent among his children, or to sell a part," etc. "The rent passes as an incident, to the purchaser of the reversion." See also Gilbert on Rents, 163, and Co. Lit. 148: "The rent is to be apportioned among the several owners of the reversion, or of the rent, according to the value of the land." "And whenever the question becomes a litigated one, it is the business of the jury to apportion the rent according to the value of the land." And he finally adds: "The rent is also liable to apportionment, by act of law, as in cases of descent and judicial sales: See Co. Lit. 224; 1 Roll. Abr., tit. Apportionment; *Wotton v. Shirt*, Cro. Eliz. 742. And assuredly sales by the coroner or sheriff carry the same incidents as judicial sales; they are acts of law, and must be placed either upon this footing, or that of sales by the freeholder himself. And we have seen that apportionment is incident to both species of sales. Finally, upon the technical rule, so well urged by the plaintiff's counsel, were I to speculate upon the strict application of the common law, that entire con-

tracts can not be apportioned, I should incline to the opinion, that no part of the rent being due at the time of the sale, the purchaser became entitled to the whole rent at its maturity, as incident to his freehold. (But see statute 11 Geo. II., c. 19, in second vol. Stat. at Large, 576, which may have introduced a modification of this strict principle.) At all events, it is unnecessary to press this argument to that extent, as the verdict merely acquits the defendants of further rent as due to Henning, or his assignee.

The motion is dismissed.

O'NEALL, EVANS, EARLE, BUTLER, and WARDLAW, JJ., concurred.

APPORTIONMENT OF RENT: See *Cuthbert v. Kuhn*, 31 Am. Dec. 513, and note; also *Nellis v. Lathrop*, 34 Id. 285; but that it can not be apportioned where the landlord terminates the tenancy between rent days, pursuant to a power in the lease, in the absence of a provision for such apportionment: *Zule v. Zule*, 35 Id. 600.

DRAGO v. MOSO.

[1 SPENCER' LAW, 212.]

INFANT OUGHT TO SUE BY PROCHIEIN AMI.

OBJECTION OF INFANCY IN PLAINTIFF can only be made by plea in abatement, and can not be given under the general issue.

INFANCY OF PLAINTIFF IS MATTER OF FORM, and is waived by pleading the general issue.

TRESPASS. The court below nonsuited the plaintiff, who appeared by attorney only, upon the defendant proving under the general issue that plaintiff was a minor. Plaintiff moved to set aside the nonsuit and for a new trial.

Bailey, for the plaintiff.

Thompson, contra.

O'NEALL, J. The case of *McDaniel v. Nicholson*, 2 Mill (S. C.), Const. 344, referred to by the recorder, as the basis of his judgment, contains an *obiter dictum*, that "a minor may commence an action, but can not file his declaration until he has some person appointed *prochein ami* or guardian; if he did not do so, and went on to trial, he must be nonsuited, whatever were the merits of the case." That case, however, presented altogether a different question. It was a summary process; the plaintiff, an infant, residing out of the state, sued by attorney, and was ordered to give security for costs; not having done so, within the

rule, he was nonsuited, and the motion on the circuit, and in the appeal court, was to discharge the security, on the ground, that the plaintiff had removed within the state; and it was held that the security ought not to be discharged. In that judgment, however, only Grimke, Colcock, and Cheves concurred generally; Judge Johnson placed his concurrence on the ground, that the court had no power to discharge from a bond on a mere motion. The other three judges gave no opinion. After this examination of *McDaniel v. Nicholson*, it is plain that it is not authority for anything which it purports to decide, much less for a point which was outside of the case made.

By statute 21 Jac. I., c. 13, sec. 2, it is enacted, that after verdict for the plaintiff, judgment shall not be staid or reversed by reason that the plaintiff in ejectment, or other personal action or suit, being an infant under twenty-one years, did appear by attorney therein. Before this statute, it was error if an infant sued by attorney, and not by guardian: *Rew v. Long*, Cro. Jac. 4; 1 Roll. Abr. 287, pl. 3; *Bartholomew v. Dighton*, Cro. Eliz. 424; since, it can only be taken advantage of by plea in abatement; 2 Saund. 212, b, note 5; for it is no longer matter of substance, but of form. The objection of infancy is not that the plaintiff has no right to sue, but that he ought to sue by *prochein ami*. If the defendant pleads issuably, he waives the objections of form. In *Foxwist et al., Executors of Pinsent, v. Tremaine*, 2 Saund. 212, the defendant pleaded that two of the plaintiffs were infants. It was agreed by all, that if an infant plaintiff, suing in his own right, sue by attorney, the bill or writ may be abated by plea. From these authorities, it seems to me plain, that the objection of infancy in the plaintiff can only be made by plea in abatement. But in the case before us, the proof of infancy came from the defendant, under the general issue. To say nothing of the irrelevancy of such proof to the issue, it is clear that the court can not, *in invitum*, order a nonsuit on the defendant's proof. The motion to set aside the nonsuit is granted.

RICHARDSON, EVANS, BUTLER, and WARDLAW, JJ., concurred.

INFANT SUING BY PROCHEIN AMI: See *Thomas v. Dike*, 34 Am. Dec. 690; *Miles v. Kaigler*, 30 Id. 425; *Fulton v. Roosevelt*, 19 Id. 409; *Apthorp v. Backus*, 1 Id. 28.

WHALEY ET AL. v. WHALEY ET AL.

[1 SPRANG' LAW, 225.]

TENANT CAN NOT DISPUTE THE TITLE OF HIS LANDLORD, either by setting up title in himself or another, during the existence of the lease or tenancy.

TENANT HOLDING AFTER EXPIRATION OF TERM is a tenant by sufferance, and holds by the title of his original landlord, until a notice to quit, or until a disclaimer of tenancy on his part.

STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF TENANT by sufferance, or one entering by permission, paying no rent, until such tenant notifies the landlord that he claims adversely. The knowledge of disclaimer must be brought home to the landlord to set the statute to running.

TRESPASS to try title. Plaintiffs are devisees of Edings, deceased, and defendants are administrators of B. Whaley, deceased. B. Whaley married the daughter of Edings in 1819, and was then put in the possession by him of the land in dispute, which he retained till his death. The plaintiffs were the issue of this daughter of Edings. She died in June, 1823. B. Whaley, her husband, married again, and had three children by his second wife before his death, in 1832. The defendants entered upon the land in dispute immediately upon his death. In 1836, Edings devised the estate in question to his grandsons, the plaintiffs, and died a few months afterwards. Verdict for plaintiffs.

Rice, for the plaintiffs.

McCrady and Petigru, contra.

BUTLER, J. The questions belonging to and fairly submitted to the jury, must be regarded by this court as satisfactorily settled by their verdict. So far as it regards the character of the possession from 1819 to 1832, a period of thirteen years, the jury were bound to pass upon it, to this extent, at least; that for the last ten years of his life, Benjamin Whaley had not acquired a good title under the statute of limitations, by virtue of any adverse possession during that time. The finding necessarily establishes that, in its inception, Benjamin Whaley's possession was permissive and not adverse, and that for the three first years he held by privity of tenure with William Edings, under whom he had entered. It is the case of a tenant entering upon land, and holding by the sufferance of the landlord, without paying rent. Such a tenancy carries with it many incidents important in this case, and which will be hereafter noticed in their

proper place. The tenant had not assumed such an adverse possession as to allow the statute to give him a good title at his death. But it is said that at any time after the thirtieth of March, 1822, or within ten years before his death, Benjamin Whaley might have assumed such a position, and that his title would have been perfected by the operation of the statute, provided the possession of the administrators could be tacked to and regarded as a continuation of his possession. The circuit judge held that the possession of the administrators could not be connected with that of their intestate, so as to make it perfect. If it could be shown that this view of the judge was material, a question of some apparent perplexity would be presented. But in the view which a majority of the court is disposed to take of the case, this point is wholly immaterial; and should it be regarded as essentially involved in the judgment of the court, the circuit decision may well be sustained by a fair view of the evidence. After the thirtieth of March, 1822, or after the twentieth of June, when Benjamin Whaley's first wife died, there was no evidence to show that the character of the possession had been changed from what it was in the beginning. The presumption of law is that it was the same, and that presumption must prevail in the absence of evidence. The morality of the law inculcates, and its provisions will enforce good faith in all the relations of life in which legal confidence has been reposed. One who enters upon land, acknowledging title in another, ought, in justice, to adhere to the original terms of his possession. It is an undoubted principle of the law, that a tenant can not dispute the title of his landlord, either by setting up title in himself or another, during the existence of the lease or tenancy. The principle of estoppel applies to them, and operates in its full force to prevent the violation of the contract by which the tenant obtained and holds possession: *Blight's Lessee v. Rochester*, 7 Wheat. 535. See also the cases of *Willison v. Watkins*, 3 Pet. 43; *Wilson v. Weathersby*, 1 Nott & M. 373. In this last case it was said and decided, "that the evidence offered by the defendant was of a title acquired by him after he went into possession under the plaintiff, and before he gave up possession. If he was at any time the tenant of the plaintiff, he continues so all the time, unless he had given up the possession."

There was no evidence here that Whaley ever gave up possession, or that he claimed to hold it differently from what he did in its origin, or the three first years of its duration. There was great reason, therefore, in holding that the possession of

the administrators could not be connected to change the character of the original possession of Whaley in his life-time; the law presuming them to be the same, that is, the termination to be like the beginning. This view of the case would be wholly immaterial, if Whaley never did assume such a position as to dissolve the relation between himself and his landlord, and thereby entitle himself to the operation of the statute of limitations. During the continuance of an acknowledged lease, the tenant can not set up title in himself to question the title of the landlord. This must always be the case where the lease is for a definite term of years. In such case the tenant must go out and disclaim the title of his landlord, and come in as any other stranger, before he can set up his title. Having forfeited his lease, he terminates its existence by his own act, and thereby becomes a disseisor and trespasser. Under such circumstances, the possession of the tenant becomes a tortious one by the forfeiture of his right. "The landlord's right of entry is then complete, and he may sue at any time within the period of limitations; but he must lay his devise of a day subsequent to the termination of the tenancy." See the judgment of Baldwin, J., in the case of *Watkins v. Willisson*. When the time of the tenancy has expired by its own limitation, the tenant is then a tenant at sufferance from year to year, and after notice to quit would be a trespasser, who could be sued in an action to try title. If the tenant continues to hold, without notice to quit, or without a disclaimer of tenancy on his part, he will be regarded as holding by the title of his original landlord. And it is said by Chancellor Harper, in his argument of the case last referred to—and which, with little qualification, was adopted as the judgment of the court—that if a tenant, at the expiration of a term, sets up claim in himself, and even gives notice of it to his landlord, yet continues to pay rent, his recognition of the landlord's title will prevent his possession being adverse; and further: "If a party enter by bare permission, remain as a tenant at sufferance, paying no rent, the tenancy can not be determined by the tenant without notice to the landlord, whatever claim the tenant may set up to himself or to others." And this, for the obvious reason that the law will not permit one to lose his rights who has no means of knowing that they are usurped. It is always necessary that the rights of the party to be affected by the statute should be so far violated as to put it in his power to vindicate them by a proceeding at law. Before the tenant can occupy an adverse position, entitling him to claim by adverse pos-

session, he must disclaim his tenancy, and give notice of that fact to his landlord. He must become a trespasser, by doing something to show that he holds the land against the consent of the owner or claimant. After that, there is nothing to prevent the owner from bringing his action to evict the wrong-doer. A secret disclaimer, unknown to the landlord, will not do. The statute can not run until the knowledge of the disclaimer is brought home to the landlord. In the case of *Watkins v. Willisson*, such was the evidence: Willisson, the ancestor of the defendant, who had entered under Burdeaux, gave notice to his landlord that he claimed in his own right, and refused to pay rent; this was in 1792. In 1802 Willisson died, leaving his widow and children in possession. A year before that time, Ralph Spence Philips became interested in the land, in right of Burdeaux; and after the death of Willisson, demanded possession of the land from the widow; she refused positively to give it up, or to acknowledge Philips' title, but held the land in the face of a litigation of ten years. In 1817 the land was sold at sheriff's sale, as the property of Burdeaux, to foreclose a mortgage assigned to Philips; and Watkins, the purchaser, brought his suit, and was defeated in the supreme court of the United States, on the ground that Willisson and his representatives having disclaimed Burdeaux's title, with express, repeated, and even hostile notice to Burdeaux and Philips, they were protected by their adverse possession under the statute. Baldwin, J., who delivered the judgment of the court, says, in so many terms, that the statute did not commence to run till the knowledge was brought home to Burdeaux that Willisson was claiming against his title, for from that time a cause of action had accrued, as in the case of discovery of fraud committed by a trustee; and the judge uses this language: "Why, then, should not the statute protect him as well as any other fraudulent trustee, from the time the fraud is discovered, or known to the landlord?"

I will venture to say, that no case has gone so far as to give a tenant a title by the operation of the statute, who has not made some open disclaimer of his tenancy, and given notice to his landlord of his hostile position. After a great lapse of time, and an omission to pay rent, a dissolution of the relation of landlord and tenant might be presumed. Such a presumption can not arise in the case under consideration; for, from the finding of the jury the presumption is the other way. In no part of the evidence does it appear that Benjamin Whaley ever gave William Edings to understand, much less did he give direct

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notice to him, that he had thrown off his tenancy, and intended to claim in his own right. There was no notice of that kind which would have authorized the jury to come to a conclusion that Edings had any reason to believe that Whaley was holding differently from his other sons-in-law, Fripp and Chisolm. So far as regards Edings, their relations were the same; and it is his knowledge, and not Whaley's designs, that the jury were bound to consider. Would it do to go so far as to say that the jury might have inferred or presumed that Edings had notice of Whaley's intention? This would subject the legal rights of land proprietors to be disposed of by the uncertainty of conjecture, instead of having them secured by the settled rules or operation of law. When a party claims by the statute, he is required to show at what time he took possession of the land, and how long he has held it: and when a tenant claims to hold adversely, he must show when that intention was made known to his landlord; otherwise he might acquire title by an evasive or secret abuse of a trust, instead of an open claim as a trespasser. It is reasonable to suppose that every one will vindicate his rights when they are openly invaded; but no one can take care of them when they are secretly undermined. It would be unsafe to suffer the possession to assume such a character as one party alone should give it, without the knowledge, control, or consent of the other; and such would be the result, if Whaley's design alone should prevail, secretly entertained and unknown to Edings.

There is nothing in this opinion which can conflict with those decisions in which it has been held that a child going into possession of land under a parol gift of a parent, may hold by the statute of limitations; for in those cases, the relation of landlord and tenant never existed or was acknowledged. The son in those cases took possession of the land as his own, and held it without any acknowledgment of title in another, and between whom and his parent there was no privity of tenure at any period of the possession. But in this case the jury have found that Whaley entered and held as a mere tenant at will, by Eding's title. As well from the finding as the evidence itself, we are satisfied with the verdict, and refuse the motion for a new trial.

EVANS, J., concurred.

O'NEALL, J. I agree to the result. There was no proof of a parol gift whatever. The character of the possession was to be judged of by the jury.

WARDLAW, J. I dissent. According to the principles of the case of *Williams v. McAiley*, Cheves, 200, the possession of the administrators holding for all the heirs of Benjamin Whaley, might be connected with the possession of the ancestor, B. Whaley, so as together to make up the time required by the statute. On this point I think there was misdirection by the presiding judge; and I can not hold that to have been wholly immaterial. It should have been left to the jury to decide whether there was not, within ten years immediately preceding the death of Edings, in 1836, such act of disclaimer as constituted an adverse possession of Whaley and his heirs for that period.

RICHARDSON, J. I concur in the above reasoning, and that there should be a new trial on the merits also.

STATUTE OF LIMITATIONS RUNS only from the time the landlord has notice of an adverse holding: See *Duke v. Harper*, 27 Am. Dec. 462, and note; *Camp v. Camp*, 13 Id. 60, and note; *Jackson v. Davis*, 15 Id. 480, and note.

ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE: See collection of cases in note to *Duke v. Harper*, 27 Am. Dec. 466.

REYNOLDS ET AL. v. REYNOLDS ET AL.

[1 SPEARS' LAW, 253.]

WITNESSES ATTESTING WILL must subscribe their names within the sight of the testator as he stood and not as he might or might not stand.

ATTESTATION OF WILL BY WITNESSES IN AN ADJOINING ROOM is not a compliance with statute requiring it to be done "in the presence of the testator," even though he might have seen them, writing their names, by sitting on the side of his bed.

BURDEN OF PROVING A WILL DULY AND LEGALLY EXECUTED, rests upon the parties claiming under such will.

APPEAL from decree admitting to probate an instrument claimed to be the last will of Thomas Reynolds, deceased. There was no pretense of fraud, but for convenience the witnesses, after seeing the testator sign, stepped into the hall and signed their names by the table there. The testator could have seen them by raising up on his elbow, and he had sufficient strength so to do, but did not change his recumbent position.

RICHARDSON, J. Did the witnesses to the will of Thomas Reynolds, sign their names in his presence, is the only question of the case. By our act of 1789, 5 Stat. at Large, p. 106, wills of lands are required, etc., to be "attested and subscribed by three credible witnesses, in the presence of the said

devisor." And by our act of 1824, 6 Id., p. 239, for putting wills of personal property on the same footing, the words are "and shall be attested and subscribed in the presence of the said testator, or testatrix, by three or more credible witnesses; or else they (the wills) shall be utterly void and of no effect." The question turns upon the words "in the presence of." Is the subscription of the witnesses, when made out of the reach of the testator's senses, if the testator still remained in the posture in which he wrote his own name, or in that in which he placed himself while the witnesses were going into an adjoining room, in order to write their names—is such attesting and subscribing, in his presence? Or is it not in his presence, when it is evident that by sitting on the side of his bed, the testator might have seen the witnesses writing their names? Assuredly, were this question between the maker of a deed and those claiming in virtue of its provisions, there would be much reason in requiring the maker to have done all he was able to do, or to suffer for his default.

But in the case of wills, the testator is passive, and the contest is between his heirs at law, and his legatees under the particular will. The provisions of the acts are therefore alone to be considered. And it equally follows, that the legatees must exhibit a will strictly lawful, or fail altogether as legatees. So that the burden of proof is upon them, to present a will in due form of law. The obvious policy, not to say the necessity, of the act of 1789, and that of 1824, concurs with this view. They were formed to protect men against fraudulent wills. Wills are usually made, as in this case, by dying men, or sick men, who are easily importuned or swayed. The act, therefore, directs the testator: 1. To sign the will himself, or have it signed at his express direction. 2. That it must be attested by not less than three witnesses, because fraudulent confederates usually conspire in pairs, and can seldom trust with safety any third person. A third is apt to derange our habit of entire reliance upon some one friend, in preference to all others; and lastly—that the witnesses shall subscribe their names in the presence of the testator, in order that it may be always within his observation, to the last act that makes it his will, and so prevent a fraudulent will being foisted in its place.

Such reasoning upon the preventive policy of the acts, points out the good sense of construing literally the meaning of the words, "in the presence of the testator," so as to make them mean, within the observance of his senses: and place the three

protections of testators against frauds, upon the same safe footing; all obvious to plain understandings, through the means of the senses. The testator signs—calls on three persons to subscribe as witnesses—and they are required to subscribe, and to do so “in his presence,” which last requisition must mean nowhere else. The particular case is hard upon the legatees, because there appears to have been no fraud whatever. But we are obliged to take the law as written in the act. And to prevent frauds in general, they must suffer from the strict enforcement of its wise general provisions against fraudulent wills. If, from the letter of the act, from its spirit and policy, and from the inconvenience that would follow, we turn to adjudged cases, we shall find the same result. As in *Wright v. Manifold*, 1 Mau. & Sel. 294; or *Winchelsea v. Wauchope*, 3 Russ. 441. The witnesses must subscribe their names within the sight of the testator, as he stood, and not as he might or might not stand. See also the cases of *Doe ex dem. Wright v. Manifold*, 1 Mau. & Sel. 294; *Winchelsea v. Wauchope*, 3 Russ. 441; 2 Bos. & Pul. 54 [mis-cited]; 3 Cond. Ch. —. And this position appears to be deduced from the adjudged cases, and to be recognized by great commentators—see 4 Kent, 574; 1 Pow. 90; 1 Roberts, 128—that, although the testator need not actually see the witnesses sign the will, yet they must have stood in a position to let him see their subscribing; which means, that they must not withdraw themselves from the continued observance of his senses, although the testator may, himself, refrain from using such senses. Such discretion is with him, but not for the witnesses to avoid the opportunity of his so doing.

It was correctly said in the argument, that a blind man may make a will. But, then, he must first be made sensible, through his remaining senses, that the witnesses subscribed in his presence, which may be done by great care. But this illustrates the rule I have laid down, that where the testator can see, he must not be deprived of the opportunity of seeing the subscription by the conduct of the witnesses. If, in the case of a blind testator, the witnesses were to withdraw their subscription from the observance of those senses by which, only, the testator could perceive their being present and were subscribing, and such a will were held to be good, the case would be analogous to the one before the court. But no such case can be found. I would not say that it is absolutely impossible (although it is so considered by great writers), that even a blind and a deaf and dumb man can make a will. But whenever such a case occurs, the

three requisites of all wills must appear: that the testator signed the will, or expressly directed it to be signed for him, that three witnesses attested it in writing, and that the testator had been sensible that they signed their names in his presence. And of these three requisites, if there be any inequality in their importance, the last is the most effectual to prevent the substitution of a fraudulent will in the place of the intended genuine will of the testator, which is the immediate object of our acts directing the manner of executing last wills and testaments. A new trial is therefore granted, upon the strict law of the case.

EVANS, BUTLER, and WARDLAW, JJ., concurred.

ATTESTATION "IN PRESENCE OF TESTATOR."—In *Edelen v. Hardy's Lessee*, 16 Am. Dec. 292, it was held that it was *prima facie* evidence of illegality that the will was attested in a room adjoining to that where the testator lay sick, although he requested the witness to go into the other room to attest it, there being but a board partition between the rooms. The case of *Ruddon v. McDonald*, 1 Bradf. (N. Y.) 352, seems to be similar to the principal case, but there the court came to an opposite opinion and admitted the will to probate. See *Russell v. Falls*, 1 Am. Dec. 380.

THE PRINCIPAL CASE IS CITED in *Wright v. Lewis*, 5 Rich. 212, and a distinction drawn between the testator withdrawing himself from the presence of the witnesses and their withdrawal from his presence. In this case the testator, immediately upon signing the will, walked off in the garden, and the witnesses stayed and attested the will where the testator had signed it, and it was held a sufficient attestation.

ATTESTATION IS SUFFICIENT, WHEN: See *Dewey v. Dewey*, 35 Am. Dec. 367, and cases collected in the note; and also note to *Remsen v. Brinckerhoff*, 37 Id. 260; *Howard's Will*, 17 Id. 60.

SNYDER *ads.* RILEY.

[1 SPEARS' LAW, 272.]

PURCHASER AT SHERIFF'S SALE IS ENTITLED TO RENT of premises from the day of his purchase.

TENANT, WITH NOTICE OF SHERIFF'S SALE OF PREMISES, voluntarily paying rent, accruing since the sale, to prior landlord, is not thereby discharged from paying such rent to the purchaser.

ASSUMPSIT for rent. Defendant rented the premises of Owen; the sheriff sold the premises to plaintiff the next month. After the sale and before the rent was due, defendant paid it to Owen, but not until Snyder had demanded payment of him. Court below decreed a payment of thirty dollars to plaintiff, being the whole rent, except ten dollars, which was the proportion accrued to Owen before the sale. Defendants moved for a new trial.

Aldrich, for the motion.

Patterson, *contra*.

RICHARDSON, J. The facts of the case make this question. After notice to Riley that Snyder had purchased the land, did the rent accruing after the purchase, pass to Snyder?

It is to be observed that the whole year's rent was not due until after the purchase, and a question might perhaps be raised, whether the rent was not due to the freeholder at the moment it became due, and whether any part of it could be due to any one but this freeholder; because no rent was due before the end of the year, when he had become the owner, and of course entitled to all the productions and incidents of his freehold, or at least to such as came to maturity after the purchase. But however such a question might be resolved, it has been usual to allow to the purchaser his proportion of the rent, measured from the time of his purchase. And in the case of *Moore v. Turpin and Powers*, 1 Spears' L. 32 [*ante*, 589], decided last term, this court recognized the right of the purchaser to that extent—no more being demanded. And the presiding judge having decreed the rent according to the same proportion, and the tenant having voluntarily paid the whole rent to his former landlord, before it became due, and after notice of his landlord being changed, there can be no reason in turning the purchaser round to his possible recovery against him. If the tenant had received no notice, and had paid the rent only at maturity, such might have been the proper course; but in this case, we perceive no reason for referring the plaintiff to that remedy.

The motion is therefore dismissed.

O'NEALL, EVANS, BUTLER, and WARDLAW, JJ., concurred.

APPORTIONMENT OF RENT: See *Moore v. Turpin*, *ante*, 589. and the cases in this series there collected and cited.

HALWERSON v. COLE

[1 SPEARS' LAW, 321.]

NO FREIGHT CAN BE CHARGED WITHOUT DELIVERY at the place of destination, unless prevented by dangers of the sea, or other unavoidable casualties.

PARTICULAR CUSTOM BECOMES A PART OF THE LAW when well understood and established. The evidence of one individual will not establish a custom or usage of trade.

MASTER OF A SHIP IS NOT AN AGENT OF THE CONSIGNOR, to judge for him when the goods are so damaged as to make a sale necessary before they reach their destination.

ACTION to recover forty-five dollars and twenty-five cents for freight. Defendant shipped hay and corn on the plaintiff's schooner to be delivered at Pilatka, East Florida. The schooner, owing to a gale, had to put in to St. Augustine, and it was found that the hay was damaged, and it was sold, netting thirty-five dollars and eighty cents after paying expenses. The corn was safely delivered. Plaintiff claimed the whole contract price for freight, and brought this action to recover the balance. The Court below nonsuited him, and he now makes this motion to reverse the order of nonsuit.

Kunhardt, for the motion.

Ashby, contra.

EVANS, J. By the bill of lading, the plaintiff undertook to deliver the goods to the defendant at Pilatka, the danger of the seas only excepted, he, the defendant, paying freight for the same at the prices stipulated. This is an entire contract, and unless there be a performance on the part of the carrier, the owner is not bound to pay freight. This is clearly decided in the case of *Hunter v. Prinsep et al.*, 10 East, 378. In that case, Lord Ellenborough says: "The ship-owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties, and the freighter undertakes that if the goods be delivered at the place of their destination, he will pay the stipulated freight; but it is only on that event, viz., of their delivery at the place of destination, that he, the freighter, engages to pay anything." The same doctrine has been fully recognized in the supreme court of the United States, in *Caze et al. v. The Baltimore Ins. Co.*, 7 Cranch, 362, and I have been able to find no case, either English or American, which sustains a contrary position. The general rule is admitted to be as stated; but it is supposed that the usage of trade in Charleston has established a different rule. If a particular custom be well established and understood, it becomes a part of the law; and contracts made at the place where such custom prevails, are construed in reference to the custom. But such custom must be clearly established, and I do not think the evidence of a single individual is enough to establish a usage of trade for Charleston, different from the general rule which governs at all other places, both in England and America. If the ship be wrecked and the goods are lost by the perils of the sea, no freight is due, because the condition precedent has not been performed. The only cases

where the owner of the goods is bound to pay full freight without delivery, are those in which the goods have been thrown overboard for the general benefit, or so used as to make the loss of them a subject of general average. In such cases, the payment of the general average is a substitution for delivery, and subjects the owner to the payment. There are some cases, where the owner is liable to pay partial freight or *pro rata itineris*, but the obligation to pay this can arise only from an agreement to accept the goods at a place, short of the place of destination. In the case of *Hunter v. Prinsep*, before quoted, the vessel had been captured, recaptured, and carried into St. Kitts, where she was wrecked, and the goods sold by order of the court of admiralty, on the application of the captain, but without orders. The sale was made for the benefit of all concerned, and the application on the part of the captain for the sale *bona fide*. Yet it was held, the shipper was not bound to pay freight even *pro rata itineris*, but was entitled to recover for his goods, without any deduction for freight.

The only ground upon which the plaintiff's case can be placed with any appearance of plausibility is, that in the condition in which the captain was placed, he was so far the agent of the shipper as to be authorized to determine on the expediency of selling the damaged goods, for the benefit of the owner. Now it does not seem to me this position can be maintained. There is no authority to sustain it. The master is the general agent for the ship-owners, and cases may arise in which his act might bind both the insured and insurer; but I have found no case where, on the question of freight, he is considered the agent of the shipper, in a matter of personal interest to himself. It would involve the absurdity, that one of two parties to a contract was the agent of the other, to determine the expediency and necessity of dispensing with the performance of his part of the agreement. But besides this, the liability of such an agency to abuse, and the strong temptation to abuse it, are sufficient reasons why no such principle should be established as a part of the law of the contract. Cases may arise in which there may exist a necessity for disposing of a damaged cargo. If it be for the general benefit, it may be a subject of general average. But in all other cases, the shipper has a right to insist on the delivery of the goods, as a condition precedent to the payment of freight. It is no answer to say the ship-owner acted *bona fide*, and the sale was for his benefit. He has commissioned no one to judge for him on that subject. He may prefer to have

the goods in a damaged state. It is his right, and can not be withheld from him, without a forfeiture of the demand for freight. The opinion of this court is, that the circuit decision was right; and the motion is dismissed.

RICHARDSON, O'NEALL, BUTLER, and WARDLAW, JJ., concurred.

WHEN FREIGHT BECOMES DUE: See note to *Tio v. Vance*, 30 Am. Dec. 718 where the cases in this series are collected.

HOCKADAY *ads.* WILLIS. SAME *ads.* SAME. BU- FORD *ads.* SAME.

[1 SPEARS' LAW, 379.]

BILL OF SALE OF GOODS LOST AT GAMBLING TABLE is absolutely void. Its assignment, unaccompanied by actual delivery of the goods, is no consideration for a note or check.

ASSIGNEE'S WILLINGNESS TO RUN ALL RISKS, given upon receiving such bill of sale would not make it a good consideration.

IF POSSESSION OF THE GOODS WAS ACTUALLY GIVEN and there was a new contract, untainted by gaming, it would be a good consideration for the note and check.

LOSER OF GOODS AT GAMING CAN NOT RECOVER THEM or their value from a *bona fide* purchaser.

TITLE OF GOODS LOST AT PLAY AND PAID DOWN is good in the hands of the winner, even against the loser, after expiration of three months.

IMMEDIATE PURCHASE OF GOODS LOST AT PLAY by the loser or a third person for him would be a palpable evasion of the statute. A note given by such purchaser would be a note given for money lost at play.

ASSUMPSITS on a note and check each for five hundred dollars, made and drawn by Hockaday, and payable to A. Wilson. Payment of the check was refused by order of Hockaday. The note was indorsed by Buford. The facts were that Wilson won from a banker, Saunders, a large sum of money and two negroes. Hockaday and Buford, being acquainted with the whole transaction, offered to give one thousand dollars for the negroes and run all risks. Wilson assigned to them the bill of sale received from Saunders, and they gave the note and check in suit. Saunders still had possession of the negroes and refused to give them up, claiming that Wilson had cheated. The court below gave verdicts for plaintiff. Defendants move for new trials.

J. B. Thompson, for motion.

Gyles and Wilson, and Kunhardt, contra.

WARDLAW, J. The statutes 16 Car. II., c. 27, and 9 Anne, c. 14 (of force here, and the only statutes we have concerning gaming, contracts, and securities), both provide penalties against trick and cozenage in gaming; and at common law, he who prevailed by such unfair practices, was much distinguished from the winner at fair play. But in these cases, this court perceives no necessity for entering upon the indecent inquiries, to which an examination into the mode in which unlawful gaming has been conducted might lead.

It appears that upon the trial of each of these cases, the sale by Wilson to the defendant, was assumed by the judge to have been proved a new contract, and that the attention of the jury was not sufficiently directed to the importance of the question, whether possession of the negroes actually passed from Wilson to the defendant. By the statute of Anne, before cited, the bill of sale made by Saunders, was as a conveyance of goods lost at play, absolutely void, and its assignment, if unaccompanied by actual delivery of the negroes, could be no consideration for a note or other promise. The expression of the assignee's willingness to run all risk, could make the promise no better, for such expression would be but a declaration in other terms of his willingness to give his note for what the law regards as utterly valueless. But if the possession of the negroes was actually delivered by Saunders to Wilson, and by Wilson to the defendant, then, if in truth the sale to the defendant was a new contract, untainted by gaming, there was a consideration for the note and check. The title of the goods themselves lost at play and paid down, as distinguished from their value, is even in the hands of the winner good as well against the loser as against an informer, after the expiration of three months: *Vaughan v. Whitcomb*, 2 New Rep. 413. And against a *bona fide* purchaser, even the loser can at no time have recovery either of goods lost and paid or of their value. Supposing, then, that Saunders, by actual delivery, paid down the negroes lost, and speedily afterwards reacquired possession, even if there should be no remedy now against him by the winner, or by one claiming under the winner, with full knowledge of the gaming, the chance that Saunders would not avoid the gaming contract, voidable only by him, before the expiration of the three months, and before the defendant should transfer the title, was in this view, the consideration of the note and check, and the failure of the defendant's expectation could not be set up as a failure of consideration against his agreement to run all risks.

The jury, however, may be satisfied, upon careful examination of all the circumstances, that the sale to the defendant, instead of being a new and valid contract, was tainted by the gaming so as to render void all securities attending it. An immediate purchase of goods lost at play, and ostensibly paid down, by the loser from the winner, would be an evasion of the statute, too palpable to escape detection; a note given in consideration of such purchase would be a note given for money lost at play. An obligation of a third person, given by the loser as a security for goods or money lost, is not less within the letter and spirit of the enactments than an obligation of the loser himself: *Hussey v. Jacob*, 1 Com. 4; *Jeffreys v. Waller*, 1 Wils. 220; *Hussey v. Jacob*, 1 Salk. 344. Like the security given upon a purchase by the loser himself, would be a security given upon a purchase from the winner, made shortly after the delivery of the goods by a third person, who, within the knowledge of the winner, was either buying for the benefit of the loser, or under an express or tacit arrangement, previously provided for changing the form of the winnings, or because of a connection subsisting between the loser and such third person as partners in the game, or as borrower and lender.

Let a new trial then be granted in each of the cases, that the facts may be submitted to the jury, with full instructions conformable to this opinion.

RICHARDSON and O'NEALL, JJ., concurred.

EVANS and BUTLER, JJ., dissented.

NOTE GIVEN FOR GAMBLING CONSIDERATION: See *Jones v. Sevier*, 13 Am. Dec. 220, note. In *Bell v. Parker*, 28 Id. 55, it was held that where the loser delivered the property to the winner and then purchased it back, giving his promissory note for the purchase money, the note was given for a good consideration, and not void as founded on a gaming consideration. But it has been held that a note given for money lent to game with is void, even in the hands of an innocent holder: *Mordecai v. Dawkins*, 9 Rich. 262; *Tidmore v. Boyce*, 2 Mills' Con. (S. C.) 200.

STATE v. PAGE.

[1 SPEARS' LAW, 408.]

TO ISSUE A SECOND FI. FA. BEFORE THE RETURN OF THE FIRST is irregular, but does not render the second *fi. fa.* void.

A VOID PROCESS IS NO JUSTIFICATION TO A SHERIFF for acts committed by virtue of it, but an irregular process is.

RESERVATION OF RENT IS NOT NECESSARY to the creation of a lease for years.

CONSTRUCTION OF AN INSTRUMENT DEPENDS UPON THE INTENTION of the parties, as collected from the whole instrument; if intended as a lease, it should be so construed. No artificial rule exists for deciding what is a lease.

PARTICIPATION IN PROFITS, WITH A POSSESSION which does not exclude the owner, will not of itself make a lease.

POSSESSION, TO "MANAGE AND CONDUCT" a hotel for a fixed compensation, creates an agency and not a tenancy.

AGENT RUNNING A HOTEL FOR HIS PRINCIPAL HAS NO LEGAL INTEREST in the possession good against an execution for the debt of the latter. His remedy is an action at law against the principal on his contract.

INDICTMENT against defendant for resisting the sheriff in levying an execution on the furniture of the Charleston Hotel as the property of the hotel company. Defendant claimed to be lessee of the hotel and furniture, and that he had a legal right to defend his possession thereof. The court below instructed the jury that the sheriff was bound to execute the *fi. fa.*; that Page was agent and not lessee, and that the furniture was liable to the execution. Jury brought in verdict of guilty.

Richardson, for Page.

Bailey, attorney general, for the state.

O'NEALL, J. Before stating the conclusion to which we have come on the legal questions in this case, it is well enough to say that the offense made out by the proof is as slight an one as can demand legal punishment; and that the whole conduct of the defendant, although it may be legally wrong, is yet free from moral blame. He is entitled, so far as we can judge from the facts before us, to the favorable consideration of the community into which he came as a stranger, confiding frankly in their kindness and generosity; and such a claim never has been, and we hope never will be, disregarded.

Two questions will be considered: 1. Was the objection to the *fi. fa.* under which the sheriff acted, such an one as to destroy its authority? 2. Was the contract of the defendant with the Charleston hotel company, either a lease or a contract conferring on him the exclusive right of possession for seven years? 1. The first question presents little difficulty. The rule is, if the process be void, it is no justification to the sheriff, but if it be merely irregular, then it is. It was irregular to issue a second *fi. fa.* when the first was not returned; but there is no doubt it was not void. Upon its face it was a *fi. fa.* issued in conformity to the judgment of a court, in a case of which it had jurisdiction. This was all to which the sheriff could look:

Harvey v. Huggins, 2 Bail. 252, 265. 2. The second question presents more difficulties. It is conceded that the mere words or form are immaterial on the question of lease. The definition given in a note to 12 Petersd. Abr. 93, is about as accurate as any which we can have. "A lease for years is a contract between the lessor and lessee, by which the lessor contracts to grant the possession and enjoyment of land, or rather hereditaments of a demisable nature, for a period of years certain; and in most cases the lessee agrees to render to the lessor a rent in money, or any other kind of payment, at the end of stated periods of a year or more, during the term. Rent is not essential to the contract, because, from favor, or from valuable consideration given to the lessor at the time of making the lease, a lease, beneficial in its nature to the lessee, may be made without reserving any rent." The contract under which the defendant claims to hold possession of the hotel and furniture, will be first considered under the question whether it can be a lease. All the cases agree in saying that this is a mere question of construction, and that there is no artificial rule by which it is to be decided. The intention of the parties is to be collected from the whole instrument; and if it was intended as a lease, then is so to be regarded, otherwise not.

It is true, that for seven years he was to "reside with his family in the hotel (free of all charge for board or rent);" "conduct the same in the manner contemplated by the parties, and to have the whole and exclusive management thereof," and that the furniture, at the end of the term, should be returned to the company by the defendant. These provisions, standing by themselves, do not make a lease. It is true, the defendant is to have possession, but it is to "manage and conduct." He is the agent of the owners, acting for them. He has not the enjoyment, in the sense in which the term is employed in the definition. It is not for himself that the product is to be; it is for the owners, and out of it, by another part of the agreement, he is to be paid for his services. This is compensation for services to be rendered on and about the premises of the company; but there is nothing like the enjoyment of the same in his own right, by the party in possession.

It is true, rent is not essential to a lease; for, from favor, or valuable consideration, the tenant may have a lease without any render. Yet that must be in a case where a lease was clearly intended. When, upon construction, it be doubtful whether a lease was intended or not, then it constitutes a very important cir-

cumstance, that rent was not reserved, *eo nomine* or substantially. In *Harker et al. v. Birkbeck et al.*, Burr. 1556, the words, "doth let or set," were used; and in another part of the paper, Harker and his partners agree to pay Mrs. Moore or her agent, one sixth pig of lead, both at the ore hearth and slag hearth, for which her agent agrees to let them have the ground in which the lead mine was the length of Mrs. Moore's lease. She was to find a smelting mill, and to have liberty to inspect the workings whenever she pleased. The partners were not to cease working for two months; and Mrs. Moore was to carry one eighth of this bargain. The court, through Lord Mansfield, said of this paper, "It is no lease, because nothing is reserved to Mrs. Moore." "It rather seems that the legal property continued in Mrs. Moore; so that it seems to be either an agreement for an assignment, or else a declaration of trust; an equitable interest, leaving the legal property in Mrs. Moore." This case, in some respects, is very analogous to the one before us, and shows that a mere participation in profits, with a possession which does not exclude the owner, will not make a lease. Looking, however, to this agreement, and construing it from its own provisions, I have no difficulty in saying it never was intended to be a lease. For although it be true, that the word "term," which is an appropriate word to designate a leasehold estate, be used, yet it is perfectly clear, that like the words "let or set," it will be controlled by the plain meaning of the contract. Indeed it may mean the end of the period for which Page was employed, as well as of any interest which he had.

The agreement states that the company and Page had agreed "for the keeping of the hotel," "for the term of seven continuous years;" "that Page, as the landlord, shall provide for the hotel;" "shall contract no debts on account of the concern, without the consent of the directors;" "reside with his family in the hotel (but free of all charge for board or rent);" keep constantly in his employment a bookkeeper, who shall keep the accounts; "but if the directors disapprove of him, he shall be discharged by Page; the books to be open for the examination of any of the directors." These provisions certainly do not indicate anything like a tenancy; they are the very words by which we would empower any agent to act for us, and by which we would undertake to direct and control him in the management of our affairs. These are followed by provisions for his compensation, varying according to the profits, but at last securing him, in any event, a certain compensation of four thousand dollars per an-

num. Look to this, on the question of tenancy, and it would be strange, indeed, that the man, hired and paid to manage an establishment, should be its tenant. Compensation for services is the general criterion by which we ascertain that one acts for another.

Another provision in the contract is, that Page's interest is personal merely, not transferable to any one, not liable for his debts; and if Page should die, that compensation should be made to his representatives. This provision, in each and every one of its parts, is at war with the notion of a lease, or any legal interest, and must effectually destroy all such pretensions. The case of *Lewis v. Gibbs*, 8 McCord, 211-217, is exactly the case before us; and I agree with Judge Colcock, when he said, "Now there was an express contract for the personal services of Hunter, giving him no interest in the soil, and had he died, his executor would have had no power to enter. There would have been an end to the contract. He was to take charge of the farm and manage it in the best manner. There is no stipulation that he shall live on it; or be found in provisions; much less that he shall exclusively occupy any part of it. His intrusion was illegal, and the lessee, Gibbs, had the same right to expel him from the house as if he had been a stranger."

After this examination of the defendant's contract, I am satisfied that it is no lease. If it be not a lease, it seems to me the contract can have no effect at law, as against the rights of the owners to possession. In showing that the contract was not to be regarded as a lease, it has been shown that Page was in possession as agent of the owners, the hotel company, to manage for them. It follows from this, that he has no legal interest in the possession which could be set up against an execution for the debt of the company. His contract is with them, and for them, and when broken, his remedy at law is by action against the company.

The motion for a new trial is dismissed.

EVANS, BUTLER, and WARDLAW, JJ., concurred.

DEFINITION OF A LEASE: See note to *Jackson v. Harsco*, 17 Am. Dec. 520

CASES IN EQUITY
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

NAPIER *v.* GIDIÈRE.

[1 SPEARS' EQUITY, 215.]

JUDGMENTS OF SISTER STATES ARE CONCLUSIVE of the fact of indebtedness. **PLEAS IN SUIT ON JUDGMENT OF SISTER STATE** are left to be prescribed by the states; the act of congress of 1790 was intended only to render a judgment conclusive of everything decided by it.

STATUTES BARRING ACTIONS ON JUDGMENTS OF SISTER STATES, if they are not brought within a specified period, may be passed.

JUDGMENT MERGES CONTRACT DEBT on which the action was brought.

SUITS ON JUDGMENTS OF SISTER STATES ARE NOT INCLUDED IN OUR STATUTE of limitations of this state; therefore such an action is not barred by lapse of time.

ACTION on a judgment of sister state. Plea, the statute of limitations. The opinion states the case.

Wilson, for the appellant.

B. F. Hunt, contra.

JOHNSON, Chancellor. In May, 1822, the complainants recovered against defendant's testator, in the city court of New York, a judgment for one thousand and ninety-three dollars and ninety-nine cents, and in January, 1837, they commenced an action on that judgment against him, in the common pleas, for Charleston district, in this state, to which he pleaded the statute of limitations. He died pending that action, and the complainants afterwards renewed it against the defendant, his executor. The cause has in the end found its way into this court, and one of the questions was, whether the judgment in New York was or was not barred by the statute of limitations of

this state. The circuit court decided for the complainant, and whether that was error or not is the only question submitted by this appeal.

That decision was in conformity with the judgment of the court in *Hinton v. Turnes*, 1 Hill, 439, where the question was directly made and solemnly decided, the whole court concurring, and I suppose would not again have been revived, but for the supposition that it had been ruled otherwise by the supreme court of the United States in *McElmoyle v. Cohen*, 13 Pet. 312, to which I shall hereafter more particularly refer, for the purpose of showing that it does not involve the question to be decided here. But as it has been again revived and again argued on general principles, the court have thought it expedient to use the occasion to put it to rest forever. Yet the whole ground has been so fully covered by the adjudications of our own courts and those of the United States and our sister states, as to leave but scanty gleanings. The question has been heretofore treated as depending on the construction of the act of congress of 1790, passed in pursuance of the authority given to congress, by the first section of the fourth article of the constitution of the United States. The constitution provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." And the act, after providing for the mode in which they shall be authenticated, declares that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

In the earlier cases in this state and in New York, and some of the other states, this act was regarded as intended merely to prescribe the mode in which the judgments obtained in one of the states should be authenticated to make them evidence in the others, leaving the effect to be determined according to the rules of the common law. They were therefore put on the footing of judgments, strictly foreign, on which debt or *assumpsit* would lie as on simple contracts, and that the record was only *prima facie* evidence of the debt; and it was held, that the plea of *nul tiel record* was inadmissible, because the usual replication of *habetur tale recordum*, was inapplicable, as the original record could not be inspected, but that under the plea of *nul debet* the

defendant was at liberty to go into evidence to impugn the contract on which the judgment was founded, and consequently might plead any other plea applicable, under the general rules of pleading, to the cause or form of the action. Such was evidently the tendency of the judgment of the court, in *Hammond and Hathaway v. Smith*, 1 Brev. 110, and *Flournoy v. Durke*, 2 Id. 257, in which it was held that *nil debet*, and not *nul tuel record*, was the proper plea in an action on the judgment of a sister state, which would, of course, open the merits of the judgment for examination. *Lambkin v. Nance*, 2 Id. 99, and *Flournoy v. Durke*, were decided at the same term. That was *assumpsit* on a judgment obtained in Virginia, and it was held that the action was well brought, and that the plaintiff might have brought debt at his election. The New York cases went on the same principle. In *Hitchcock and Fitch v. Aicken*, 1 Cai. 461, and *Hubbell v. Coudrey*, 5 Johns. 132, the judgments of other states are treated as foreign judgments—*prima facie* evidence only of a debt, and of course open to examination. The principle on which these cases proceeded would obviously have let in the plea of the statute of limitations, and it is a little remarkable that its application escaped the observation of the profession until it was made in the case of *Hinton v. Townes*, 1 Hill (S. C.), 440. There seems indeed to have been an undefined and mysterious regard paid to the judgments of the sister states in this respect, altogether at variance with the severe scrutiny to which they were subjected in many others. The question has, however, been re-examined, and stands now on the true foundation. The judgments of a sister state are no longer regarded as merely *prima facie* evidence of a debt, liable to be opened and rebutted by proof, but as conclusive of the fact of indebtedness. It was so held in *Mills v. Duryee*, 7 Cranch, 481. Mr. Justice Story, who delivered the judgment of the court, after referring to the constitution and the act of congress, says that the judgment of a sister state may be proved in the manner prescribed by the act, and such proof is of as high a nature as the inspection by the court of its own record, or as an exemplification would be in any other court of the same state, and the plea of *nil debet* was therefore inadmissible.

Precisely the same question arose in Massachusetts, and at the same time (March, 1813), in the case of *Bissell v. Briggs*, 9 Mass. 462 [6 Am. Dec. 88], in which Chief Justice Parsons remarks that "judgments rendered in any other states are not, when produced here, as the foundation of actions, to be consid-

ered as foreign judgments, the merits of which are to be inquired into, as well as the jurisdiction of the courts rendering them. Neither are they to be considered as domestic judgments rendered in our own courts of record, because the jurisdiction of the courts rendering them is the subject of inquiry. But such judgments, so far as the court rendering them had jurisdiction, are to have, in our courts, full faith and credit." The effect of the judgments in one state in the courts of another, again came up in *Hampton v. McConnel*, 3 Wheat. 234, in which Chief Justice Marshall says that they should have the same credit, validity, and effect, in every other court of the United States, which they have in the state where they were pronounced, and therefore the plea of *nil debet* could not be pleaded to actions brought upon them.

Much diversity of opinion seems to have existed as to what might be pleaded to an action on a judgment in another state. In *Hinton v. Turnes*, 1 Hill, 445, Judge O'Neill says that it is to be tested by the inquiry whether it would or would not be good in the state where the judgment was obtained; and Chief Justice Marshall, in *Hampton v. McConnel*, 3 Wheat. 234, holds the same doctrine. "And whatever pleas," says he, "would be good to a suit thereon in such state" (the state in which the judgment was obtained), "and none others, could be pleaded in any court in the United States." That, I think, is laying down the rule too broadly, and the whole force of it was not seen at the time, nor was the question in either case necessarily involved. All that was intended by the act of congress, was to render the judgment conclusive of everything decided by it; that is, its effect in the court in which it was obtained, and of necessity the fact of the judgment can only be tested by the plea of *nul tiel record*. In all other respects, the states are left to prescribe their own forms of pleading. On this principle it was held by the supreme court of the United States in *McElmoyle v. Cohen*, 13 Pet. 312, that the statute of limitations of Georgia, which declares that actions on the judgments of another state shall be barred unless brought within five years after judgment rendered, was properly pleaded to a judgment obtained in South Carolina. It seems, too, that it is now well settled that under the plea of *nul tiel record*, the jurisdiction of the court which pronounced the judgment may be inquired into. Such is the opinion expressed by Chief Justice Parsons in *Bissell v. Briggs*. See also *Hall v. Williams*, 6 Pick. 242 [17 Am. Dec. 356]. In all the cases the rule seems to have been laid down so broadly as to be liable to misinterpretation.

If it appear from the record, as by the plea to jurisdiction, that the question was whether one or another of the courts of the state where the cause was tried, had jurisdiction of the subject-matter, the judgment on that point would, according to the rule before laid down, be conclusive. But whether the party sued is or is not the same against whom the judgment was obtained, is a question which would necessarily be open in the court where the judgment was obtained, and necessarily so everywhere else. So too where the proceeding was *in rem*, as a foreign attachment, the judgment could operate on the thing only, and not upon the person.

I have gone something out of the way, and perhaps unnecessarily, for the purpose of explaining some doubts in relation to the points before noticed, for the whole court is of opinion that the question here is concluded by the case of *Hinton v. Townes*, before cited. I have no question that the legislature of this state might, as in Georgia, have passed an act barring actions on the judgments of other states, without any violation of the constitution or act of congress; but the provisions of our statute do not extend to the case. The provisions of it applicable to this question are that "all actions of account and upon the case; all actions of debt grounded upon any writing or contract without specialty," shall be barred, etc. The original cause of action here, was contract, but it is no longer so, it has passed into a judgment, and that is the foundation of the action, and therefore not embraced in our statute; that effect is precisely the same whatever may have been the original cause of action; it is merged in the judgment; as effectually so as if a bond or other specialty had been given for a simple contract debt. It has assumed a new form, and a name not found in our statute.

The case of *Cameron v. Wurtz*, 4 McCord, 278, is supposed to conflict with this view, but that too is the result of the construction of our own act, providing for the order in which the debts of a person deceased shall be paid when it becomes necessary to marshal the assets. By the act of 1789, 5 Stat. at Large 111, the funeral and other expenses of the last sickness, and the charges of administration, are first to be paid, "next, debts due to the public; next, judgments, mortgages, and executions, the oldest first; next, rent; then bonds or other obligations; and last, debts due on open accounts;" and it is provided that no "preference shall be given to creditors in equal degree, when there is a deficiency of assets, except in the cases of judgments and mortgages that shall be recorded, from the time of recording,

and executions lodged in the sheriff's office, the oldest of which shall be first paid, or in those cases where a creditor has a lien on any particular part of the estate;" and it is evident that the preference here given to mortgages and judgments is in respect to the lien they have on the estate. That of course can not apply to the judgments of another state; and as they do not fall within the debts described in any of the other classes, they must fall in with the last, and rank as a simple contract debt.

The motion to reverse the circuit court decree must therefore be dismissed, and it is so ordered.

HARPER, JOHNSTON, and DUNKIN, Chancellors, and O'NEALL, EVANS, BUTLER, and WARDLAW, JJ., concurred.

JUDGMENTS OF SISTER STATES, EFFECT OF: See note to *McLure v. Bencont*, ante, 437, referring to other cases in this series.

PLEAS TO ACTION ON FOREIGN JUDGMENTS.—The statute of limitations may be pleaded to an action on a foreign judgment: *Williams v. Preston*, 20 Am. Dec. 179. In *Evans v. Tatem*, 11 Id. 717, it was held that the pleas of *nil debet* and *nul tiel record* to a decree of a court of another state for the payment of money were bad on general demurrer. If the defendant intend to deny the existence of such a decree he must frame his plea so as to meet the averment in the declaration, and conclude to the contrary: See *Fletcher v. Ferrel*, 35 Id. 143.

MERGER OF DEBT IN JUDGMENT.—This subject is discussed in the note to *Speed v. Hann*, 15 Am. Dec. 82. See also *Harris v. Alcock*, 32 Id. 158; *Bendernagle v. Cocks*, Id. 448; *Moale v. Hollins*, 33 Id. 684. The principal case was referred to with approval in *Lyman v. Brown*, 2 Curt. 562.

LAMB v. LAMB.

[1 SPEARS' EQUITY, 289.]

ADMINISTRATOR'S SALE OF PERSONALTY SHOULD BE ON DAY PRESCRIBED in the order of sale; but the order does not entirely exclude discretion on the part of the administrator; and if circumstances justify it, he will be warranted in postponing the sale.

WHERE SALE IS POSTPONED BY ADMINISTRATOR to a different date from that prescribed in the order of sale, it is incumbent on him to show that he exercised a sound discretion, and acted with a view to the best interests of all the parties.

ADMINISTRATOR HIRING OUT PROPERTY WITHOUT TAKING SECURITY except the note of the person to whom it is hired, is liable for the loss sustained in consequence.

BILL for partition of the estate of Alexander Lamb, who died, leaving for his heirs, his widow, the present complainant, and several children, the defendants. The widow was appointed

administratrix of the estate, and her accounts were referred to a commissioner. It seems that the ordinary had made an order for the sale of the property, and that the administratrix had not sold for some months after the day specified, a loss thereby occurring; and also, that the administratrix had hired out one of the slaves at a certain rental, and had taken no security therefor but the note of the person to whom the property was hired, and the amount was lost by the person's subsequent insolvency. In his report the commissioner charged the administratrix with the loss arising from the postponement of the sale, but not with that arising from the hiring. Both parties excepted to the report; the plaintiff, because she was charged with the first loss. The defendants' second exception to the report, in that she should have been charged with the loss arising from the hiring, was sustained by the chancellor. Plaintiff appealed.

Robbins and McIver, for the appellant.

David, Blakeney, and Dargan, contra.

DUNKIN, Chancellor. The legal title to the personal estate being in the executor or administrator, it was very customary for the personal representative to sell the personalty without any authority from the ordinary, or any other court. This has been restricted by the acts of assembly. In granting the order or authority to sell, the ordinary sometimes fixes the day of sale; and, more frequently, leaves that to the discretion of the administrator. When a time is specified, the sale should be made on that day. But it can not be supposed that this is so indispensable as to exclude the exercise of any discretion on the part of the administrator. A storm, the absence of bidders, or other like circumstances, would not only warrant, but require a postponement. The authority is granted at the instance of the administrator. He ought, and will be likely, to conform to the provision in this respect. If there is any postponement, it may be incumbent on him to show that he exercised a sound discretion, and acted with a view to the best interest of all the parties. In this case, the administratrix had an interest of one third in the sale of the cotton. She was advised to postpone the sale. Mr. Sparks, General McQueen, and Mr. David (the present ordinary), were of opinion that she acted judiciously. The two former (gentlemen of intelligence and experience) pursued the same course with their cotton at that time. The ordinary, Mr. Stubbs, who granted the authority, was himself present aiding the administratrix, and he stated to one of the

witnesses at the time that "he thought it was best to postpone the sale of the cotton until the whole crop was gathered, and then sell the whole together." It seems to the court that, under these circumstances, the administratrix ought not to have been rendered liable for the loss, and the exception should have been sustained.

This court concur with the chancellor as to the defendant's second exception. Having omitted to take security on the note, the administratrix was properly charged with the loss.

Let the report of the commissioner be reformed according to the principles of this decree.

JOHNSON and HARPER, Chancellors, concurred.

EXECUTOR'S DISCRETION IN SALES UNDER ORDER OF COURT.—Authority of administrator to sell his intestate's estate must be strictly pursued, and the formalities prescribed by the order of sale must be carefully observed: *Wyman v. Campbell*, 31 Am. Dec. 677; though an executor may sell part of a tract of land under an order of sale of the decedent's real estate to pay his debts, although his petition prays for, and the court orders the sale of the whole of it: *Ehoy v. Higby*, 28 Id. 633. Where an executor, under a license from the court to sell real estate for the payment of debts, sells a greater quantity than is authorized by the license, the sale is invalid: *Adams v. Morrison*, 17 Id. 406; *Wakefield v. Campbell*, 37 Id. 60, and note.

JACKSON v. McALILEY.

[1 SPEARS' EQUITY, 303.]

IN ORDER THAT MARITAL RIGHTS MAY ATTACH, it is necessary that the husband should take possession as husband, and as of his own property, and not as trustee.

HUSBAND HOLDS PROPERTY AS TRUSTEE FOR WIFE when he takes possession of it under an order that it be vested in the wife, and that he execute proper trust deeds for it to the commissioner of the court.

LIEN OF AN EXECUTION WILL NOT ATTACH on property which a husband holds as trustee.

WHERE HUSBAND IS PERMITTED TO TAKE POSSESSION of wife's separate property by the commissioner, before he has made a trust deed to her, in pursuance of the order of court, it is not such a fraud on third persons that the property will be subject to execution against him, the wife having had no agency in the matter.

SAMUEL McALILEY, the court commissioner of the lower court, was in possession of one Barber's estate, and in 1835 an order was made directing that certain of the property be vested in the complainant, Martha Jackson, for her sole and separate use; and it further directed that William Jackson, the husband of

Martha, execute proper trust deeds of the property to the commissioner. The commissioner under this order allowed Jackson to take possession of the slaves without having executed the deed of trust, and the deed was not executed till 1841. In the mean time Jackson had contracted a debt with the defendant, James McAliley, who obtained judgment thereon, and levied on the property, not having notice of the order of 1835. Complainant filed this bill to have the benefit of the order of 1835, and to enjoin the defendant from selling. The chancellor dismissed the bill, and the complainant appealed.

McCall, for the appellant.

Gregg, *contra*.

HARPER, Chancellor. There is certainly no question with respect to the recording of a marriage settlement (supposing the conveyance directed by the order of the court to be such settlement). The only settlement executed was duly recorded. Then on what ground is the property in possession of the husband to be regarded as liable to his creditors? The argument is, that the slaves in question were the property of the wife, which the husband has reduced into possession, and which must therefore, to all intents, be regarded as his property. But in order that the marital rights may attach, at all events in this court, it is necessary that the husband should take possession as husband, and as of his own property, and not as trustee. It has been repeatedly decided, that if the husband be in possession as administrator of an estate, of which his wife is entitled to a distributive share, the marital rights will not attach until the estate be fully administered and partition made. If he be in possession, as executor, of a specific legacy given to his wife, the marital rights will not attach until, by some act, he signifies his assent to the legacy, and his intention to take possession in the character of husband. If property be given to the separate use of the wife, by deed or by will, without the intervention of a trustee, it is the well-settled doctrine of this court, that, though the marital rights may attach at law, the husband will be regarded as trustee; still more, if property were given to the husband, expressly, in trust for the separate use of his wife. And the lien of a judgment or execution will not attach on property which a man holds only as trustee. A specific legal lien will prevail against subsequent general legal liens, as where land is articulated to be sold, the contract will be enforced against subsequent judgment creditors: *Finch v. Marquis of Winchelsea*, 1 R.

Wms. 277. Is there any doubt, but that in the present instance a bill would at any time have been sustained on the part of the wife against the husband, to compel him to execute a settlement in pursuance of the order of the court? But a trust in personalty may be created by parol, without deed or writing, and the same law would apply if personal property were delivered to the husband, with a parol declaration that it was in trust for the separate use of his wife. But this is precisely what I understand to have been done in the present case. The commissioner in equity was a trustee for the wife, and delivered the property to the husband, in pursuance of the order of the court, and with a view to a settlement being made. Even a purchaser, still more a volunteer, taking possession of trust property with a notice of the trust, will be made a trustee by the court.

I know of no other ground on which the decree could be sustained, unless that there was fraud in permitting the property to go into the possession of the husband, so as to enable him to gain credit. But this can not of itself constitute fraud, or every one who lends or hires property to another, or furnishes him with goods on credit, would be guilty of the same sort of fraud. Though the commissioner may have been guilty of negligence, in delivering the property to the husband, until the settlement made and recorded, I do not perceive that any fraudulent purpose can be imputed to him. But it must be the fraud of the party beneficially entitled to the property which will preclude him from asserting his title to it. The wife was such party in the present case, but it does not appear that the property went into the possession of the husband, by any fraudulent contrivance of hers, or that she had any agency in the matter.

It is ordered and decreed, that the decree of the chancellor be reversed, and that the defendants be perpetually enjoined from enforcing their execution on the slaves in question.

JOHNSON, Chancellor, concurred.

JOHNSTON, Chancellor, absent from indisposition.

WIFE'S SEPARATE PROPERTY, WHAT IS: See *Allen v. Allen*, 39 Am. Dec. 553; *Kee v. Vasser*, ante, 442, and notes, referring to other cases in this series.

TRUSTS IN FAVOR OF WIFE: See *Shepard v. Shepard*, 11 Id. 396; *Emery v. Neighbour*, Id. 541; *Sharp v. Wickliffe*, 14 Id. 37; *Boykin v. Ciple*, 29 Id. 67; *Hamilton v. Bishop*, Id. 101; *Robinson v. Dart's Executors*, 31 Id. 569; *Yardley v. Raub*, 34 Id. 535; *Weeks v. Hass*, 39 Id. 39.

TRUST PROPERTY IS NOT SUBJECT TO EXECUTION against the trustee: *Bostick v. Keizer*, 20 Id. 237; *Weeks v. Hass*, 39 Id. 39.

ELLERBE v. ELLERBE.

[1 SPEARS' EQUITY, 328.]

WHAT IS A "REASONABLE AND COMPETENT SUPPORT" as provided for in a will, does not mean merely the food and clothing necessary to sustain life, but a support in the place and manner in which a party has been accustomed to live.

BEQUEST FOR REASONABLE AND COMPETENT SUPPORT DOES NOT TAKE EFFECT when the party in whose favor the bequest is made has sufficient property for her own support.

PARENT CAN NOT CLAIM ALLOWANCE FOR SUPPORT OF HER CHILD when she has sufficient means to support him, although a will provides that she and her child have a reasonable and competent support out of the proceeds of the estate.

BILL for account, partition, and relief, filed by Ellerbe, the executor of the last will and testament of William Ellerbe, deceased. An answer was filed by Elizabeth Ellerbe (late Mrs. Cash) and her son, a minor, E. B. C. Cash, averring that she has received but a small portion of the amount due her. The defendant claimed under a clause in the will as follows: "It is my will that * * * my daughter, Elizabeth E. Cash, and my grandson, E. B. C. Cash, have a reasonable and competent support out of the proceeds of my estate," and alleges that no allowance has been made to her for the support. The matter was referred to a commissioner, and there was considerable discussion as to what constituted a "reasonable and competent support." He allowed the defendants a sum that was equivalent to the value of their board and clothing, and both parties excepted to his report; the complainant holding they were not entitled to any support after they ceased residing at the family mansion, and the defendant claiming the allowance to be insufficient, because it included only board and clothing. It appears that the defendant had property of her own for the support of herself and child. The chancellor refused to make the allowance, and the defendants appealed.

McIver and Withers, for the appellants.

Hanna, Moses, and Dargan, contra.

HARPER, Chancellor. The principal question in this case, is not one of construction, as seemed to be thought in argument, but of fact. No doubt a reasonable and competent support is given by the will, both to the testator's widow, and to his daughter and grandchild. But this reasonable and competent support, does not mean merely the food and clothing nec-

ecessary to sustain life, nor any other fixed quantity or allowance, but must, as contended for on the part of the appellant, depend on circumstances and exigencies. If, as in the case of *Whilden v. Whilden*, Riley's Ch. 205, a testator leaves a fund for the support of a large family, of whom one is an infant, one a boy at school, one at college, you would not give an equal allowance for the support of each of these. The inquiry would be, what was necessary, or suitable and proper, or what amounts to the same thing, reasonable and competent, in the situation of each. But suppose, as in the same case, that you should find one established in the world of a large fortune, perhaps larger than that of the father, living in a style of fashion and expense, how would you make an allowance for his support? One would hardly think of making him such an allowance as should supply necessary food and clothing. But beyond this, there is no limit but such a provision as will enable him to live in the style and manner in which the testator knew him to be living, so as to exempt his private fortune from that expense, and enable it to accumulate. But this would be to defeat the purpose for which support was provided.

In the case before us, it is contended on behalf of the appellant, that she should have such an allowance as would support her in the place and manner she had been accustomed to live. There seems to be no other practicable method of construing a bequest for support or maintenance, than to mean, that support shall not be wanting. If the legatee's private means are unable to supply it, the deficiency shall be made up out of the testator's bounty. Of course, a different intention, gathered from the terms of a particular will, might lead to a different construction. In the present case, the widow, so far as appears, had no property of her own. Her support, therefore, must, of necessity, have been provided for, altogether out of the testator's estate. But it is agreed that his daughter had sufficient property for the support of herself and child, and there was no room for the bequest for the support to take effect.

It was argued, with respect to the grandchild, that he had no property of his own, and must, therefore, come within the scope of the testator's bounty. The claim, however, is not on his behalf, but that of his mother. He has, in fact, been supported by her, and the claim must be similar to that of one who has advanced his money to fulfill the object of a trust, and comes to be reimbursed of the trust fund. But I have known no instance of a mother, of ability to maintain her children, having them-

selves no property of their own, who has been reimbursed for doing so. It is said, generally, that parents of ability are bound to maintain their children, though a difference is indicated, where the mother has entered into a second marriage: 1 Bl. Com. 446; Reeve's Dom. Rel., c. 9. In *Volentine v. Bladen*, Harp. 9, it was held, that the mother might maintain an action on a contract, made with her for the work and labor of her son. But if she be entitled to the services of her child, she must be bound for his maintenance.

The decree is affirmed.

JOHNSON and DUNKIN, Chancellors, concurred.

JOHNSTON, Chancellor, absent from indisposition.

NECESSARIES.—What articles are necessities depends upon the circumstances of the party for whom they are furnished: *Stanton v. Willson*, 3 Am. Dec. 255; *Watson v. Van Valkinburg*, 7 Id. 395. They are those things suitable to the rank and condition of the husband: *Cunningham v. Irwin*, 10 Id. 458, and note discussing this subject. For examples of what the term "necessaries" includes, see *Rainwater v. Durham*, 10 Id. 637; *Kline v. L'Amoureux*, 22 Id. 652; *Stone v. Dennison*, 23 Id. 654; *Conn v. Coburn*, 26 Id. 746; *Gay v. Ballou*, 21 Id. 158; *Owen v. White*, 30 Id. 572; *Grace v. Hale*, 36 Id. 296; *Hunt v. Thompson*, Id. 538.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

INGRAM v. MORGAN.

[4 HUMPHREYS, 66.]

SUPPRESSION OF DEFECTS OF TITLE BY VENDOR, who sells with full covenants of warranty, having only a bond for the title, is a fraud upon the vendee.

CHANCERY WILL GRANT RELIEF TO A DEFRAUDED VENDEE upon a covenant of seisin in the deed, if the vendor is utterly insolvent.

EQUITY PRIOR IN POINT OF TIME MUST PREVAIL in point of right.

BILL in chancery for a perpetual injunction. Garrett sued Ingram in the name and for the use of Morgan, and obtained judgment. Ingram filed this bill to restrain Morgan and Garrett from enforcing the judgment. Garrett, at the time of receiving the note, notified Ingram, and received from him part payment and a promise for the balance. As soon as Ingram heard that Morgan had no title for the land, but only a bond for one, he refused to pay such balance. Suit was brought, and the judgment in question obtained for it. Other facts are sufficiently stated in the opinion.

Smith, for the complainant.

Brown, for the defendant.

By Court, REESE, J. Ingram purchased of Morgan a tract of land, and took from him a deed of conveyance, with covenants of seisin, title to convey, and general warranty, and he went into possession. At the time of the sale Morgan had no title, except a bond from one Rivers, whose wife was one of the heirs of one Rhodes (these heirs being owners of the land), and Morgan did not communicate to complainant that he had no title, or a

title so defective as almost to amount to no title. Rivers is dead, and more than a thousand dollars of the consideration from Morgan to the administrators is unpaid, and legal proceedings to subject the land to the payment of it have been commenced. Morgan is utterly insolvent. The last of the price or consideration to be paid by Ingram to Morgan is a note, which Morgan passed by delivery, and without indorsement, to Garrett, in payment of a precedent debt. Upon this note, Morgan, for the use of Garrett, has obtained a judgment at law, and this bill is filed to enjoin that judgment. And the first inquiry is, whether complainant, as against Morgan, is entitled to relief in equity? And we think he is: 1. The confidence between vendor and vendee requires where such defects of title as those of the case before us existed at the time of the sale, that they should be stated by the vendor to the vendee, and the suppression of them amounts to fraud; 2. Upon the covenants of seisin and title to convey, Ingram has a present and active right of action at law against Morgan for breaches of those covenants of the deed, and he could not fail to recover to the extent of the unpaid consideration due to the administrators. This indeed would repel him from a court of chancery, but that Morgan is admitted to be utterly insolvent, and a judgment against him would be worthless. This differs from a covenant of warranty, where there is no present right of action, and can never be till eviction, which may never take place; and where, therefore, a court of chancery will grant no relief against the payment of the consideration, on the joint grounds of a defect of title, and the insolvency of the vendor. Does Garrett stand in a better situation than Morgan in the present case? We are of opinion that he does not; he received the note in payment of a pre-existing debt, and without indorsement. He has not the legal title to the note, and did not receive it in the due course of trade. There is no principle of public commercial policy to come in aid of his claim, and the circumstances under which he took the note are not identical with those set forth in the case of *Ingham v. Vaden*, 3 Humph. 51, so as to repel the complainant from setting up his equity as against him. The promises he made to pay, in ignorance of his condition with regard to title, will not prevent him from resisting the payment of the note. So far as Garrett has any equity, it is founded upon the satisfaction of his pre-existing debt against Morgan, and he has no legal title. Ingram's equity is prior in point of time, and must prevail in point of right.

Let the decree of the chancellor be affirmed.

THAT BETWEEN MERE EQUITIES THE ELDER IN POINT OF TIME IS THE BETTER, see *Polk v. Gallant*, 34 Am. Dec. 410; *Skipwith v. Cunningham*, 31 Id. 642.

FRAUD ON THE PART OF THE VENDOR IN SUPPRESSING DEFECTS in a title will entitle the vendee to relief in a court of equity: *Cullum v. Branch Bank*, 37 Am. Dec. 725; *Crane v. Conklin*, 22 Id. 519. The principal case is cited to the effect that, where there is a covenant of seisin or warranty of title, a court of equity will not interpose, unless upon the ground of fraud, or the insolvency of the vendor, or some other distinct ground of equitable jurisdiction, in *Barnett v. Clark*, 5 Sneed, 437; *Woods v. North*, 6 Humph. 312; *Young v. Butler*, 1 Head. 649; *Baird v. Goodrich*, 5 Heisk. 24.

KIMBRO v. LAMB.

[4 HUMPHREYS, 95.]

INDORSEMENT IN BLANK, WITH EXPRESS AUTHORITY "TO FILL UP the indorsement in any way he thought proper," given by the indorser to the holder, does not give the latter authority to fill up "waiving demand and notice."

DEBT against Webb and Lamb. Subsequently a *nolle prosequi* was entered as to Webb. Verdict for defendant. Other facts are stated in the opinion.

Dunlap and Totten, for the plaintiff in error.

Fitzgerald, for the defendant in error.

By Court, GREEN, J. The defendant is the payee of a note, executed by John Webb, which he indorsed to the plaintiff. The indorsement was in blank, and it was filled up by the plaintiff, waiving demand and notice. It was proved, that the defendant told the plaintiff he might fill up the indorsement in any way he saw proper. The court told the jury, that if the parties had an understanding or agreement that the plaintiff should fill up the indorsement, waiving demand and notice, the defendant would be bound by it; but that in the absence of such evidence, the plaintiff could only fill up the indorsement with an ordinary assignment of the legal interest. The jury afterwards came into court and inquired whether, if the defendant said the plaintiff might fill up the indorsement in any way he thought proper, would that authorize him to fill it up waiving demand and notice. The court said, that such expressions of a party at the time of making a blank indorsement, would only authorize him to fill it up so as to assign the legal interest. In this charge there is no error. The contract which is made by the mere indorsement of negotiable paper, and that which

was filled up over the name of the defendant in this case, are very different. The blank indorsement would only authorize the holder to fill up the assignment, passing the legal interest to whomsoever he might think proper. Unless the party to whom a note is transferred by blank indorsement be authorized by the agreement of the indorser to insert in the assignment, that demand and notice are waived, he can not so fill it up. The authority which the law implies, is only a right to fill up the assignment, transferring the legal interest in the paper to whomsoever he pleases. If it is desired that the assignment shall contain any other agreement than the law implies, it must be shown that the indorser authorized such agreement to be inserted.

It is insisted for the plaintiff, that the expression of Lamb to Kimbro, that he might "fill up the indorsement in any way he thought proper," gave Kimbro a right to fill it up waiving demand and notice. We think the opinion of the circuit court is correct upon this point. The express authority here given, is only that which the law implies, and nearly in the language laid down by Chitty. It means only that the holder may use any form of language, in the assignment of the paper to any person he may choose to name as indorsee. But it is insisted that the court charged the jury upon the facts, as well as the law of the case, and that this was error. We do not understand this charge in the least degree trenching upon the province of the jury. The jury inquired whether, if certain words were used by the defendant, they would convey to the plaintiff authority to insert, in this assignment, the contract waiving demand and notice. Here was a fact found by a jury, or hypothetically assumed to exist. The remarks of the judge, in reply, taking the fact as stated by the jury, indicate his opinion as to whether the words used do, in law, constitute an agreement of the defendant that the plaintiff may write over his signature any special contract he may think proper. They were confined strictly to that legal proposition. If the jury had found that by the use of these words, Lamb intended to convey the authority to Kimbro to fill up the indorsement waiving demand and notice, the previous charge of the court had indicated that he would be bound, and that they must find for the plaintiff. But they pronounced no such proposition. They ask, whether the words used by Lamb, *per se*, authorized Kimbro to write the special contract over his name. And we think the court answered correctly, that they would not. If the authority existed, to insert in the assignment the words "waiving demand and notice," we

do not perceive but that, upon the same authority, he might not have coupled with the assignment any other contract he might have wished. But such unlimited authority is not contended for, and certainly was not conferred.

Let the judgment be affirmed.

WAIVER OF DEMAND AND NOTICE is not made by indorser saying that he had no dependence on maker paying it, and that he understood the note was lying over unpaid: *United States Bank v. Southard*, 35 Am. Dec. 521; see also cases collected in the note, p. 523.

The principal case was before the court once before, see 3 Humph. 17, and the judgment of the lower court reversed because the court refused to admit the parol evidence of the authority given to fill up the blank indorsement.

ELLIOTT v. THOMPSON.

[4 HUMPHREYS, 99.]

EQUITY WILL NOT GRANT RELIEF TO VENDEE IN POSSESSION, with covenants of warranty, in the absence of fraud or eviction, but will grant such relief when the vendor or his personal representatives have agreed to an abatement in the purchase price.

MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF TITLE is the consideration price with interest, and not the value of the land at the time of eviction.

BELL in chancery for an injunction against the enforcement of a judgment. Other facts appear in the opinion.

Turley, for the complainant.

Humphreys, for the defendant.

By Court, REESE, J. Hopkins in 1832 sold and contracted to convey to one Bell, a tract of land of upwards of five hundred acres, at the price of four dollars per acre, and took the bonds of Bell for the purchase money, and gave him a bond or covenant to convey title on the payment of the purchase money. The land in question had, in early times, been entered in the name of David Ross, and no grant at the time of this contract with Bell had been issued to the heirs of Ross. This land had been located by Pillow and Bradshaw, and they or their heirs had an equitable right to one fifth, or one hundred and sixteen acres, for the locative share. It does not appear from the allegations of the bill, or the proof in the case, that Bell at the time of the contract was not well informed of this state of the title. In 1833 or 1834, Elliott, the complainant, purchased the land in question of Bell, and subsequently surrendered to Hopkins the

title bond or covenant for a conveyance made by Hopkins to Bell and assigned to him, and accepted from Hopkins a deed of conveyance, in which there is no covenant of seisin, or for further assurance, or to remove incumbrances, but a covenant merely of general warranty as the title, and of special warranty against any claims of the heirs of Pillow and Bradshaw. Complainant gave to Hopkins his bonds for the amount contracted to be paid by Bell, and the bonds of Bell were surrendered to him by Hopkins. At this time complainant knew of the claim of Pillow and Bradshaw for a locative share in the land, and was not ignorant, as we think, from the proof, of the general state of the title. Hopkins in his life-time, although proposing and promising to do so, did not complete any negotiation with Pillow and Bradshaw for the extinguishment of their equitable title to a locative share. The administrator of Hopkins brought suit for the balance of the consideration and obtained judgment; and complainant filed this bill of injunction. The administrator in his answer, offers and agrees to an abatement of his judgment at law, on the ground of the locative share of Pillow and Bradshaw, although there had been no recovery or eviction by them against the vendee of his intestate, the complainant, to the amount and extent of the value of the locative share, as fixed by the terms of the sale to Bell; or, in other words, to abate the consideration money and interest of the one hundred and sixteen acres. Complainant subsequently filed a supplemental bill, alleging that he had purchased and paid for the locative share; and that it cost him the sum of one thousand dollars, and he claims an abatement to this extent.

Two questions have been discussed: 1. The jurisdiction of a court of chancery to grant any relief under the circumstances of this case? and 2. If relief can be granted, what shall be the extent of that relief? We have considered the evidence with some care, and are satisfied that it does not establish fraud against Hopkins; and in the absence of fraud or eviction, the vendee in possession under a deed, with covenants of special warranty, is entitled to no equitable relief on account of the outstanding incumbrances or adverse title. No conversations of Hopkins proved in the record, as to his purchasing the locative share, either by their own proper force, or in connection with the covenant of special warranty, if they could be so connected, constitute a ground upon which the court could rest the jurisdiction of a court of chancery to enforce the specific execution of contracts, according to the course of the court in such cases.

1. If it were not, then, that the administrator of Hopkins has in his answer offered to abate, and submitted to an abatement on the ground of the locative share, it would be difficult indeed to maintain the jurisdiction of the court in the present case.
2. There can be no doubt as to the extent of the relief to be granted. In this case, equity must follow the law.

If Pillow had recovered his locative share from the complainant, and evicted him from the one hundred and sixteen acres, complainant could, at law, in an action of covenant for the breach of the warranty of his deed, have recovered against Hopkins the consideration money, only, and the interest thereon. The earlier cases on this subject, in this state, are marked by some fluctuation in the principle of compensation. But the question has been fully settled, and for a considerable length of time, in favor of the consideration price, and against the value at the eviction. Particular cases have arisen, and will arise, where the enforcement of the one rule or the other would fall short of or exceed the just claims or liabilities of the one party or the other. But having established a general rule on the subject, it is our duty on grounds alike of justice and policy, and in courts of equity as well as in courts of law, inflexibly to adhere to it. The inconvenience arising from its practical enforcement can be readily obviated by the purchaser insisting upon the insertion of further covenants in the deed; as of seisin; to remove incumbrances; for further assurances, etc.

The chancellor, in this case, gave relief to the extent submitted to in the answer of the administrator. So far was proper, and we affirm the decree.

DAMAGES FOR BREACH OF WARRANTY OF TITLE is the purchase money, with interest: See *Logan v. Moulder*, 33 Am. Dec. 339, and cases cited in note, 345; *Staats v. Ten Eyck's Executor*, 2 Id. 254. In *Horsford v. Wright*, 1 Id. 8, the measure of damages was held to be the value of the land at the time of eviction; but the note to this case shows that the rule in the principal case is the English rule, and the one generally adopted in the various American states. The principal case is cited to the effect that, upon failure of title, the measure of damages is the purchase money, with interest, in *Key v. Key*, 3 Head, 450; *Crittenden v. Posey*, 1 Id. 320. This rule is well established in Tennessee: See *Shaw v. Wilkins' Administrator*, 8 Humph. 653, and the cases above cited.

ALLEN v. DODD.

[4 HUMPHREYS, 131.]

MONEY OR PROPERTY LOST AT GAMING CAN NOT BE RECOVERED BACK, except by the express provisions of a statute.

BET OR WAGER LOST, AND THE MONEY OR PROPERTY DELIVERED to the winner, courts will not aid in its recovery, both parties being equally derelict.

DEBT, with a count in detinue. Jury found for plaintiff, and defendant, Allen, brought this appeal.

McKinney, for the plaintiff in error.

Arnold, *contra*.

By Court, **REESE, J.** In September, 1840, shortly preceding the last presidential election, the plaintiff in error, Samuel Allen, signed and sealed the following instrument: "For value received, I promise to pay John Dodd two hundred dollars, in specie, whenever Martin Van Buren is elected president of the United States, at this present presidential election; and if either Mr. Van Buren or Harrison dies before the election in 1840, then the said John Dodd is to receive but one hundred dollars." At the time this instrument was made, Dodd delivered to Allen a gray horse, which was worth the sum of one hundred dollars. The transaction was a bet or wager upon the result of the pending presidential contest. This suit was brought by Dodd, after the result of the election was ascertained, to recover the value of the horse, or the horse itself, it being an action of debt, with a count in detinue. By the judgment of the circuit court, Dodd recovered the value of the horse, and Allen has prosecuted his appeal in error to this court, for the purpose of reversing that judgment. The matter chiefly insisted on as error, in the argument before us, is, that the circuit court charged the jury, "that although the contract may have been executed, and the horse delivered, before the result of the presidential election was known, and the suit in this case was not instituted until after such result was ascertained, still the condition of the defendant, to whom the horse was delivered before the result was ascertained, and who retained him afterwards before the suit was brought, was not better than that of the plaintiff, who might, under any circumstances, treat the contract as a nullity, and well maintain this action."

The plaintiff in error, by his counsel, strenuously, and, as we think, successfully, contends that this portion of the charge is erroneous. If a party comes into court seeking to enforce an immoral or illegal contract, it is most obvious that he must be repelled by the courts, if they would not countervail the very end and object of their creation. It is different, indeed, in many cases in principle, when something having been done under such

a contract, a party comes, not to enforce it, but in disregard and disaffirmance of it, to right himself for some injury sustained or loss incurred by means of it. This he may do, or not do, according to the time and stage of the affair, the nature of the transaction, and other circumstances.

In wagering contracts, when the impending event is undecided, and after the event, as against a stakeholder, he may come and disaffirm the contract and recover his property; and on the ground of the nature of the transaction, he may often do so, where the matter is consummate as in transactions merely illegal, and where the parties, although both in fault, stand in a different relation to the transaction, and the policy and interest of the community are in favor of permitting the one party to set aside the transaction, without permitting which, indeed, it would have been in vain to have declared it illegal; as contracts of an usurious character: and a general principle of distinction has been attempted to be maintained, and in many cases has been recognized between cases, on the one hand, affected by illegality merely, and cases, on the other hand, where the contract was either *malum in se*, immoral, or contrary to public policy; a party in the former cases being permitted, after the contract is executed and consummated, to invoke the aid of a court of justice to set aside the contract and redress himself, and in the latter cases, being repelled from a court of justice on the ground, that being equally derelict in the transaction towards society, with the party complained of, the court will not hear his case and grant relief, not because his adversary is not to blame, or equally to blame, but because he having violated law and good morals shall not be heard to allege that his very cause of action and claim to redress are expressly based upon the fact of such violation of law and morals. In such case the defendant is in the better, that is, in the safer attitude, he being required to say or do nothing; while his adversary has to show the case. Wagering upon elections is a transaction of this latter description. Money or property lost at gaming can not be recovered back, except by the express provisions of the statute, and in the time therein limited. But for the statute, this could not be done, because of the operation of the general principle above discussed. But wagering upon elections is not embraced by the statutes on the subject of gaming, nor by that which gives to a party losing, the right to recover back his property within ninety days. This case is embraced by the general principles of many cases, a number of which have been referred to in the argument

before us. But the very facts and circumstances of this case, occurred in the case of *McCullum v. Gourlay*, 8 Johns. 147, in which it was determined in the general, that when a bet or wager is lost, and the money or property has been fairly paid or delivered, the court will not help the plaintiff. "And where A. delivered to B. two firkins of butter, and agreed that if P. was elected governor of the state B. should pay a certain price for the butter, otherwise he was to pay nothing, and P. was not elected: it was held, that A. had no right of action against B. for the butter."

We are, therefore, of opinion, on grounds of reason and authority, that the verdict and judgment of the court below are erroneous; that the same must be set aside and reversed, and a new trial be had, when the law will be charged conformably to this opinion.

BET ON ELECTION, MONEY PAID, WHEN MAY BE RECOVERED: See *McAlister v. Hoffman*, 16 Am. Dec. 558, note. See also, *Stacy v. Foss*, 36 Id. 755.

THE PRINCIPAL CASE IS CITED to the effect that a court will not lend its aid to enforce a contract founded on an immoral or illegal act, in *Thornburg v. Harris*, 3 Coldw. 172; *Parks v. McKamy*, 3 Head, 298; *Wood v. Stone*, 2 Coldw. 373; *Kelton v. Millikin*, Id. 414; *Rhodes v. Summerhill*, 4 Heisk. 208; and cited, to the effect that if the plaintiff rescind the contract before the event happens upon which the wager depends, he can recover it from the stakeholder, or the winner if it has been delivered over by the stakeholder after notice not to deliver, in *Guthman v. Parker*, 3 Head, 234.

KIRKLAN ET AL. v. BROWN'S ADM'RS.

[4 HUMPHREYS, 174.]

MONEY PAID UPON A JUDGMENT IN A COURT of competent jurisdiction, can not be recovered in another action.

ASSUMPSIT. Judgment for plaintiffs. Defendants appealed in error. The facts are stated in the opinion.

Jarnigan, for the plaintiffs in error.

Vandike, contra.

By Court, REESE, J. Plaintiffs in error, upon a reference to arbitrators, had obtained an award against defendants' intestate for the sum of about seventy-five dollars, in a case depending in court, and where the arbitrament was made under the rule and by the order of the court. Before judgment had been given upon the award, Brown filed a bill in the chancery court, and obtained an injunction. His honor the chancellor, by his

decree, dissolved the injunction and gave judgment in his court for the seventy-five dollars. This court, however, upon appeal in that case, held, that although the decree dissolving the injunction was correct, yet it was not proper for the chancellor to have given judgment for the money; for on grounds connected with the conduct of the arbitrators or attorneys, the court of law might not give judgment upon the award; and it left the parties freed from the injunction, to take their own course in that respect. Subsequently to this, the award was made the judgment of the circuit court by the rendition of a formal judgment thereon; this judgment was not appealed from, and is unsatisfied and in full force. Upon this judgment an execution issued and the amount of it was collected from Brown, and the execution and judgment satisfied.

This suit is brought by Brown's representatives to recover back the money collected on said execution, upon the ground that some time before the circuit court gave judgment upon the award, plaintiffs and Brown had had a settlement of their dealings and claims, in which the seventy-five dollars due by the award had been included. This as a matter of fact, from what is shown in the whole record before us, may be very questionable. But the jury having found the testimony to be so, we would not upon that ground disturb their verdict. But we are very clear, upon well-settled principles of law, that the action is not maintainable. *A priori* views of reason and policy would so settle the question, if it could be, from its nature, new or open. If a party, without moving for a new trial, or taking an appeal, or resorting to proceedings in error, *coram nobis* or *coram vobis*, or proceedings in the nature of, or substituted for, an *audita querela*, or filing his bill in chancery, might pay the money in the judgment recovered against him, and, then, in the same tribunal, be permitted to sue, in order to recover any portion of it back on the ground that the money was not justly due, in whole or in part, when would there be even a hope that litigation would cease? And if the plaintiff in the last suit succeeded, and the defendant paid it back, what would prevent him, in a third suit, from asserting the correctness of the first judgment? In the great case of *Moses v. Macferlan*, 2 Burr. 1005, the *ex equo et bono* principle of the action of *assumpsit*, announced by Lord Mansfield, as well as the facts and circumstances of that case, might seem to give some ground for the maintenance of a suit like this. But of that case, as well as of some others determined by Lord Mansfield, it may be said, *ma-*

teriam superavit opus. The great principles marked out and developed by his original and powerful intellect, remain to guide us; but their frame work, the facts and circumstances to which they were appended, not always appropriate, have in some instances given way and ceased to sustain them. Of the case of *Moses v. Macferlan*, it was said by Chief Justice Eyre, 2 H. Bl. 416, "that that judgment did not satisfy Westminster Hall at the time; that he never would subscribe to it; it seemed to him to unsettle foundations." And afterwards, in the case of *Marriott v. Hampton*, 7 T. R. 269, where it appeared, that the defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid, and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a *cognovit* for the cash. The plaintiff afterwards found the receipt, and brought this action for money had and received, in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord Kenyon, C. J., was of opinion, at the time, that after the money had been paid under legal process, it could not be recovered back again, however unconscientiously retained by the defendant, though the case of *Moses v. Macferlan* was referred to, and the plaintiff was nonsuited. And upon a motion being made for a new trial, Lord Kenyon said: "I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by due process of law, there must be an end of litigation, otherwise there would be no security for any person. I can not, therefore, consent, even to grant a rule to show cause, lest it should seem to imply a doubt." That case has been followed ever since, and it has become a fixed principle, that when money has been recovered by the judgment of a court, having competent jurisdiction, the matter can never be brought over again by a new action. For until the judgment is set aside or reconsidered, it is conclusive, as to the subject-matter of it, to all intents and purposes.

The case before us falls within the scope of these principles, and must be controlled by them. The judgment must be reversed and a new trial be had in the circuit court.

MONEY PAID UPON A JUDGMENT. — "It is clear that if there be a *bona fide* legal process under which money is recovered, although not actually due, it can not be recovered back, inasmuch as there must be some end to litigation:"

Duke de Cadaval v. Collins, 4 Ad. & El. 867. A party who has made payments on articles, and who in an action for the price of such articles failed to prove such payments, can not maintain an action to recover back the amount so paid by him: *Wilson v. Cameron*, 1 Kerr (New Brunswick), 542. A party having found a receipt for a debt which he had been compelled to pay by judgment, having sought to recover back the money paid, Lord Kenyon, before whom the case came, said: "I am afraid of such a precedent. If this action could be maintained, I know not what cause of action could ever be at rest. After recovery by process of law, there would be no security for any person:" *Marriott v. Hampton*, 7 T. R. 269. See also *Phillips v. Hunter*, 2 H. Bl. 410. To a similar effect is the opinion in a recent English case, denying the right to recover back part of a debt paid before judgment, but which plaintiff did not credit. "It is not," said the court, "competent to either party to an action, to aver anything either expressing or importing a contradiction to the record, which, while it stands, is, as between them, of uncontrollable verity:" *Huffer v. Allen*, 12 Jur. (N. S.) 930, and 2 L. R., Exch. Cas. 15. Substantially the same view is taken in nearly all of the United States. The only remedy of the defendant in such cases is by appeal, new trial, proceedings in chancery, or in the nature of an *audita querela*: See *Corbet v. Evans*, 25 Pa. St. 310; *Tilton v. Gordon*, 1 N. H. 33; *Le Grand v. Francisco*, 3 Munf. 83; *James v. Cavit*, 2 Brev. 174; *Stephens v. Howe*, 127 Mass. 164; *Greenabaum v. Elliott*, 2 Cent. L. J. 439.

NICELY v. BOYLES.

[4 HUMPHREYS, 177.]

DECREE IN PARTITION IS NOT A SETTLEMENT OF A TITLE, and will not estop the defendant from having a legal investigation of his title in an action of ejectment.

EJECTMENT. The facts are found in the opinion.

Peck, for the plaintiff in error.

McKinney, for the defendant in error.

By Court, TURLEY, J. This is an action of ejectment brought against the plaintiff in error, and the bill of exceptions shows the following facts:

The premises in dispute were granted by the state of North Carolina, to Robert King, in 1795, and were sold and conveyed to John Bullard by George Sniffer, sheriff of Claiborne county, by virtue of a judgment and execution against Robert King, in 1807, and by John Bullard to George Buler, in 1807. George Buler died about the year 1818, leaving Elizabeth Nicely, Woody Buler, and several others his heirs at law. In July, 1837, a petition was filed by said Elizabeth Nicely and others, a part of the heirs of said George Buler, against Woody Buler and others, the balance of said heirs, for a partition of said land. Woody

Buler filed his answer to the petition and resisted the partition, claiming to hold the land in his individual right by virtue of a purchase from the heirs of said George Buler, and a continued unmolested possession thereof for fourteen years. Notwithstanding this defense, commissioners were appointed by the court to make the partition, and at the June term, 1838, of the chancery court at Tazewell, they made the report, partitioning the land between the heirs of George Buler, deceased, which was confirmed by the chancellor. By this report and the decree thereon, the land sued for in this action was allotted to Elizabeth Nicely, and was by her sold and conveyed on the twenty-second day of January, 1838, to James Nicely, the lessor of the plaintiff. Upon the trial in the court below, the defense set up was, that Joseph Buler, the defendant, held as tenant of Woody Buler, whose title was perfect by operation of the statute of limitations. There was much proof showing that Woody Buler had been in the uninterrupted possession of the premises from the death of his father, George Buler, a period of more than twenty years, claiming to hold the same in his own right. But it was contended on the part of the plaintiff, that the record of partition, made by the chancery court of Tazewell, precluded the defense; that Woody Buler's title had been then adjudicated upon by the chancellor, and determined against him; that the matter was *res adjudicata* and not open to investigation in this action, and so the circuit judge determined.

Is this defense correct? We think not. The bill for partition is not a bill to settle title, but a bill to divide that which belongs to tenants in common or joint tenants, among them in severalty, and if the title be disputed, partition will not be made until the dispute is settled in an appropriate form of action. A bill of partition is not this. Indeed the chancellor (so far as we see) did not attempt to adjudicate upon the separate and exclusive right claimed by Woody Buler against the other heirs of George Buler, deceased, and to hold that Woody Buler is estopped by the decree of partition from having a legal investigation of his title in the action of ejectment, is to deprive him of an asserted right without a hearing.

We then hold that if Woody Buler, at the time of the partition, had a legal right as against the other heirs of G. Buler, the decree of partition did not deprive him of it, but that he ought to have been permitted to avail himself of it in his defense to the action of ejectment. Did he have such legal right? We shall not at this stage of the proceeding undertake to deter-

mine this question; there is much proof upon it, which ought to have been submitted to the jury under the charge of the court, and which must be done before this case can be finally determined.

The judgment will, therefore, be reversed, and the case remanded for a new trial.

JUDGMENT IN PARTITION, EFFECT OF.—In *Ferrier's Case*, 6 Co. 7, "it was decided that there was a difference between real and personal actions; that in personal actions the bar of a prior judgment is perpetual, for the plaintiff can not have an action of a higher nature, but if demandant be barred in a real action by judgment, he may have an action of a higher nature to try the same right again." Freeman on Judgments, sec. 293. That the law gave "consecutive remedies for injuries to real estate, is recognized in all the books that treat on real actions." Vin. Abr., Judgment, Q. "Partition was at common law classed as a real action. The judgment in partition therefore had no higher effect, as *res judicata*, than if rendered in some other action of like dignity. Partition was considered as a mere possessory action, which left the title as it found it." Freeman on Co-tenancy and Partition, sec. 529, citing *Pierce v. Oliver*, 13 Mass. 212; *Nicely v. Boyles*, 4 Humph. 177; *Nash v. Outler*, 16 Pick. 500; *Whitlock v. Hale*, 10 Humph. 64; *Gouldie v. Northampton Water Co.*, 7 Pa. St. 238; *Richman v. Baldwin*, 1 Zab. 398. The supreme court of Pennsylvania, in *McClure v. McClure*, 14 Pa. St. 136, speaking of the effect of a judgment in partition, said: "What was the legal effect of that judgment? It did not determine title between tenants in common, who held by descent from a common parent. It decided only that it should be parted and divided among them. It is the partition that is to remain firm and stable. The parties acquire no new title; there is nothing but dividing the old one among them." And in *Mallet v. Foxcroft*, 1 Story's C. C. 475, Judge Story thus describes the effect of a common law partition: "The present suit is a writ of right, and no judgment in a writ or petition for partition will constitute any bar to the maintenance of a writ of right between the same parties. A writ of partition, or a petition for partition, which is but a substitute for the former, is a mere possessory action, and at most a judgment in a possessory action can bar only an action of as high a nature, that is, a possessory action, for the judgment only establishes the right of possession. But a writ of right is in no sense a possessory action. It is founded upon the mere right and not upon the possession; and the general issue or mise is but a trial of the mere right."

From the above authorities it will be seen that at common law the effect of a judgment in partition was only to vest in each party a sole seisin in his allotment, and ascertain and affirm the possession of the co-tenants as between themselves. But the rule that a judgment is conclusive on all the issues determined by it, applies as well to judgments in partition as to judgments in any other form or kind of actions: *Flagg v. Thurston*, 11 Pick. 431; *Ihmsen v. Ormsby*, 32 Pa. St. 200; *Foxcroft v. Barnes*, 29 Me. 129; *Robb v. Aiken*, 2 McCord's Ch. 125; *Dixon v. Warder*, 8 Jones, 450; *Herr v. Herr*, 5 Pa. St. 428; *Burghardt v. Van Deusen*, 4 Allen, 375. Hence, whenever the title is in issue, it is bound by the judgment. In most of the American states the action of partition has ceased to be a mere possessory action, and has come to involve the right as well as the possession. In *Whittemore v. Shaw*, 8 N. H. 397, the court say: "There is nothing then on which to found

a distinction in this respect between a verdict and judgment in a petition for partition and a verdict and judgment in a writ of entry. The former is of as high a nature as the latter. If the one may lie after the other, it can not be to try the same question of title which has been put in issue and tried in the first. This can not be done even in a writ of right. 'It is not the recovery, but a matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel.' The conclusion is inevitable that as by the statute the right of the party to a share—which is, in other words, his title to a share—may be tried in a petition for partition, and a judgment rendered, that judgment is as valid and conclusive as to the matter put in issue and tried as a judgment in any other proceeding." In a suit brought in ejectment by a plaintiff who had been a party to a suit in partition, but which he claimed affected another and different title from that which he now sought to assert in ejectment, the court said: "The judgment of partition establishes the title to the land which is the subject of the partition, and, in an action of ejectment upon an adverse possession, or an adverse title existing at the date of the partition, it is final and conclusive at law upon all parties to the record, and on all persons holding under them afterwards: *Clapp v. Bromagham*, 9 Cow. 569. The statute requires that the petition shall set forth the rights and titles of all parties interested in the premises sought to be divided, and of all persons having, upon any contingency, a beneficial interest therein, present or expectant. It requires the court to ascertain by evidence, by confession, or by verdict, and to declare the rights, titles, and interests of the petitioners and defendants; and the final judgment, that the partition be firm and effectual forever, is made binding and conclusive on all parties to the proceedings, and their representatives, and on all those claiming under them by right derived after the commencement of the suit. It provides further that if it shall appear that there are parties claiming the same portion adversely to each other, the court may decide upon such adverse claims, or, in its discretion, direct such share to be allotted, subject to such claims; and there can be no doubt that if any party defendant wholly denied the tenancy in common, and claimed the land adversely to the plaintiff, he could so answer, and if that issue were found for him, it would entirely defeat the partition as against him. When the title or possession is held adversely, that matter must first be settled either in the partition suit, when it can be done under the statute, or by an action of ejectment, before a partition can be had, either at law or in equity:" *Forder v. Davis*, 38 Mo. 115.

The above statement of the law in Missouri is equally applicable in many other states. There seems to be a conflict among the cases in reference to whether another and different title acquired by one of the parties after the judgment in partition may be asserted by such party against the other parties to the judgment. In *Tapley v. Pike*, 50 Mo. 592, such a party was permitted to assert his after-acquired title, which proved to be paramount to the one involved in the partition suit. But in *Doe on dem. of Short v. Prettyman*, 1 Houst. (Del.) 334, it was held that an heir was bound by a judgment in partition with his co-heirs, both as to his rights at the time of the judgment and as to those that he subsequently acquired from other heirs who were not parties to the petition. The better doctrine seems to be that as each co-tenant, after a compulsory partition, if evicted, can call on the other co-tenants to contribute their proportion to his loss, each is estopped from asserting any independent adverse title to the purparties assigned to the others: *Venable v. Beauchamp*, 28 Am. Dec. 74; *Walker v. Hall*, 15 Ohio St. 362; *Mills v. Witherington*, 2 Dev. & B. 433. A parcener had at common law the right to re-enter and de-

feet the partition, if evicted by title paramount, from her purparty, or she could obtain a recompense for the part which she had lost. This right to a recompense was extended by statute to joint tenants and tenants in common, and has been frequently recognized and enforced in the United States: Freeman on Co-tenancy and Partition, sec. 533; *Dugan v. Hollins*, 4 Mo. Ch. 147; *Walker v. Hall*, 15 Ohio St. 362; *Sawyers v. Cator*, 8 Humph. 256, 287; *Feather v. Strohoecker*, 24 Am. Dec. 342; *Nixon v. Lindsay*, 2 Jones' Eq. 233. A court of equity will exercise the same jurisdiction to correct, enjoin, or set aside a judgment in partition for mistake, accident, or fraud, that it would with ordinary judgments: *Ross v. Armstrong*, 25 Tex. Supp. 372; *Boyd v. Doty*, 8 Ind. 373; *George's Appeal*, 12 Pa. St. 260; *Douglass v. Ville*, 3 Sandf. Ch. 439; *Winn v. Dickson*, 15 La. Ann. 273; *Guedici v. Boots*, 42 Cal. 452; *Manning v. Horr*, 18 Iowa, 117. As a general rule, where the partition is invalid, for some reason, as to some or all of the parties, as where some of the co-tenants were not parties to the suit, or the partition has not been sanctioned by a final judgment of the court, etc., if the parties treat it as valid and accept their purparty, it becomes binding on them by such subsequent acts of ratification, and they have been held estopped from alleging its invalidity: Freeman on Co-tenancy and Partition, sec. 535; *Mellican v. Mellican*, 24 Tex. 439; *Jackson v. Richtmyer*, 13 Johns. 376; *White v. Clapp*, 8 Metc. 370; *McQueen v. Fletcher*, 4 Rich. Eq. 152; *McGregor v. Reynolds*, 19 Iowa, 228; *Piatt v. Hubbel*, 5 Ohio, 243; *Welchel v. Thompson*, 39 Geo. 561; *Craig v. Craig*, Bail. Eq. 103. But this rule has been denied in one instance at least: *Cogswell v. Reed*, 12 Me. 198. Doubts were formerly entertained, whether in a suit in equity for a partition, brought only by or against a tenant for life of the estate, where the remainder is to persons not *in esse*, a decree could be made which would be binding upon the persons in remainder. It is now settled, however, that such a decree is binding upon them, upon the ground of a virtual representation of them by the tenant for life: *Gaskell v. Gaskell*, 6 Sim. 643; *Martyn v. Perryman*, 1 Ch. R. 235; *Brook v. Hertford*, 2 P. Wms. 518; 1 Story's Eq. Jur., sec. 656 a.

DICKERSON v. ROGERS.

[4 HUMPHREYS, 179.]

RESPONSIBILITIES OF INNKEEPER ATTACH to one keeping an inn *de facto*, although he has no license as required by statute.

INNKEEPER IS LIABLE FOR HORSES OF GUESTS INJURED OR KILLED by negligence in securing them, or by imperfect and badly constructed stable.

TRESPASS on the case. The facts are stated in the opinion.

McKinney, for the plaintiff in error.

Peck, for the defendant in error.

By Court, GREEN, J. This action is brought by Rogers against the plaintiff in error as an innkeeper, charging that she so negligently kept his horse while he was a guest at her inn, that his horse was injured and died. It appears from the proof, that the plaintiff's horse was put in the stable of the defendant, and

while there, thrust his head through an opening of the partition between the stalls above the trough; that the plank immediately above, being loose, slipped down and pressed his neck so that he could not withdraw his head; and while thus fastened, his exertions to get loose injured him so seriously, that he died in a short time. The court charged the jury in substance, that an innkeeper is bound to take all possible care of the goods of his guests; and that if through any default of him or his servants, any injury or loss should occur, he will be liable in damages for the value of the property lost. But if the injury occur through accident, and from no default or neglect of the innkeeper or his servant, he will be exonerated from liability. An innkeeper is bound to provide safe stabling for the horses of his guests, and so constructed and arranged that the horses placed within it will be secure and safe from injury; and if owing to the defective and imperfect construction of the stable, or its stalls, an injury is done to the horse of the guest, the innkeeper will be responsible for the injury. But if an injury result to a horse in consequence of his vicious habits, and not through any negligence or want of care of the innkeeper and his servants, he would not be liable therefor. The jury found a verdict for the plaintiff for the value of the horse, which the court refused to set aside, and the defendant appealed to this court.

It is not seriously insisted that the charge of the court is erroneous, nor indeed could it have been done successfully. It is laid down by Chancellor Kent, 2 Com., 2d ed., 593, upon the authority of the English cases, that an innkeeper is bound to keep safe the goods of his guest deposited within the inn, except where the loss is occasioned by inevitable casualty, or by superior force, as robbery. And Mr. Justice Story says (*Law of Bailments*, 306, sec. 470), that an innkeeper is bound to take, not ordinary care only, but uncommon care, of the goods and baggage of his guests. If, therefore, the goods or baggage of his guest are damaged in his inn, or are stolen from it by his servants or domestics, or by another guest, he is bound to make restitution. Rigorous as this rule may seem, and hard as its operation may be in a few instances, it is founded on the great principle of public utility, to which all private considerations ought to yield. "For," as Sir William Jones justly observes (*Bailments*, 95), "travelers, who are most numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innkeepers, whose education and morals are none of the best, and who might have frequent opportuni-

ties of associating with ruffians and pilferers, while the injured guest would seldom or never obtain legal proof of such combinations, or even of their negligence, if no actual fraud had been committed by them." Upon these principles it is clear that the circuit court was right, in holding that the innkeeper was bound to provide safe stables for the horses of his guests; and that any injury sustained by the horse, the result of negligence in securing him properly, or of an imperfect and badly constructed stable, must be compensated in damages by the innkeeper. If this rule was not inflexibly enforced, no traveler would be safe in intrusting his horse to the hands of the innkeeper, until he had first inspected his stables, and selected a place for his horse to be kept, an inconvenience which could not be endured.

But it is insisted, that the plaintiff in error was not an ordinary innkeeper, because she had obtained no license to keep an inn, as the act of 1811, c. 113, requires. We are of opinion this act is not in force. By the act of 1835-6, c. 13, sec. 4, it is provided, that "each and every keeper of a tavern, or house of public entertainment, shall pay annually a tax of five dollars; provided, that such license shall not authorize the retailing spirituous liquors, unless such privilege is mentioned in the license, in which case twenty-five dollars shall, in addition to the said sum of five dollars, be paid for such license. By the act of 1837-8, c. 37, so much of the act of 1835-6 as imposes a tax on a tavern-keeper, or requires him to obtain a license, is repealed: and by the act of 1837-8, c. 120, all laws taxing retailers of spirituous liquors are repealed. The act of 1835-6 is inconsistent with the act of 1811 and 1823 upon the same subject, and by implication repeals those acts; and when, by the act of 1837-8, it is repealed, there is no law authorizing or requiring licenses to be granted to innkeepers, for the repeal of the act of 1835-6 does not revive the acts of 1811 and 1823. The act of 1811 inflicted a penalty upon any person who should retail spirituous liquors, unless such person should have a license to keep an ordinary, or house of entertainment. The license which was required, by the first section of the act, to be obtained, was intended to protect the community against the mischief which the legislature saw must result, if any person, however unprincipled and debased, were permitted to retail spirituous liquors. Hence they required that the county court shall be satisfied of the good character of the applicant, and that he is prepared to accommodate travelers, and that the principal object in obtain-

ing a license is not to retail liquors. But the acts of 1837-8 having prohibited the retail of spirituous liquors altogether, and having repealed the law requiring tavern-keepers to obtain license, we think the acts of 1811 and 1823 stand repealed.

What, then, constitutes a person an innkeeper? In the case of *Thompson v. Lacy*, 3 Barn. & Ald. 283, an inn is defined to be "a house where the traveler is furnished with everything which he has occasion for whilst on his way." Judge Story (Bailments, sec. 775) quotes this definition with approbation. It is not necessary that a party should put up a sign as a keeper of an inn. It is sufficient if in fact he keeps one. If he do, he is liable to all the responsibilities of an innkeeper. And this we think would be so, though he had failed to obtain a license, should the statutes require one. It would be another question, whether, if a party fail to comply with such provision of a statute, he shall be entitled to all the rights and privileges of an innkeeper.

Upon the whole, we think there is no error in the record, and that the judgment must be affirmed.

LIABILITY OF INNKEEPER: See note to *Clute v. Wiggins*, 7 Am. Dec. 448, where the subject is discussed at length. In *Albin v. Presby*, 29 Id. 679, they were held not liable for goods stolen from wagon left under a shed; and see note, where other cases in this series are collected. In *Hill v. Owen*, 35 Id. 124, held *prima facie* evidence of negligence, that horse delivered in healthy condition in the evening to the innkeeper is found dead the next morning.

RAMSEY v. CLARK.

[4 HUMPHREYS, 244.]

NOTE SOLD AT GREATER DISCOUNT THAN THE LEGAL INTEREST does not thereby become usurious, if the payee has received it in a business transaction.

ACCOMMODATION NOTE DOES NOT BECOME USURIOUS by being sold at a greater discount than the legal rate of interest, unless the purchaser knew that it was obtained for that purpose.

THE facts are stated in the opinion.

Taul, for the plaintiff in error.

Turney, for the defendant in error.

By Court, GREEN, J. This is a suit commenced before a justice of the peace, to recover money which the plaintiff alleged he had paid upon a usurious contract. It appeared in evidence, that the plaintiff below, Joseph Clark, procured his father,

Absalom Clark, to execute to the plaintiff his note for seventy-five dollars, due twelve months after date, with a view to raise money on it. This note was sold to Ramsey for sixty dollars. When this note fell due, the said Absalom executed to Joseph Clark a note for ninety dollars, also payable twelve months after date, and this note was given to Ramsey to take up the one for seventy-five dollars. When the ninety-dollar note fell due it was paid, and this suit was brought to recover the excess over six per cent. per annum, that was discounted in these two transactions. The court charged the jury in substance, that if the note was made as the result of a business transaction, the payee might sell it at a greater discount than six per cent. per annum, if he thought proper, and the transaction would not be usurious; but, that, if the note was made for accommodation, to be sold in the market to raise money, and it was purchased at a greater rate of discount than six per cent. per annum, the transaction would be usurious. And, that, it is unimportant whether the purchaser of the note knew it was made for accommodation, to be sold in the market to raise money, or not; that under such a state of facts, the transaction would be equally usurious without notice as with it. In a criminal prosecution the law would be different, because, in such case, the intent with which the act was done would be material. The jury found a verdict for the plaintiff for twenty-eight dollars. The court refused to grant a new trial, and the defendant appealed to this court.

We think the court erred in the latter part of the charge, in which the jury were told, that the purchaser of a note at a greater discount than six per cent. per annum, would be guilty of usury, if it should turn out that it was made for accommodation, and was not a real transaction, although he might be entirely ignorant of the consideration for which the note was made. We do not understand any decision of this court to have gone so far, and we think, upon principle, the proposition is erroneous. The fourth section of the act of 1834 (Ca. & Nich. 407), provides a remedy, "when a greater sum, than that prescribed in the third section, is reserved directly or indirectly." It is manifest that this language is not applicable to the business transaction of purchasing a note, but it does embrace the case where there is a negotiation for a loan of money, and the stratagem is resorted to of obtaining an accommodation note of another person to be sold, with a view to evade the laws against usury. In such case the usury is in fact and in substance reserved indirectly; although it is in form the purchase of a note, yet it is in

substance a loan of money. But if the purchaser of the note knows nothing about the consideration for which it was made, and takes an assignment of it, supposing it to be a lawful business transaction, he can be guilty of no desire indirectly to reserve a greater amount of interest than the law allows. In form it is admitted the contract is valid and that it becomes invalid, by showing that it was a contrivance to evade the law, and in fact indirectly reserving usurious interest.

The case of *Dews v. Eastham*, 2 Yerg. 463, was plainly one of this kind. In that case, John Dews applied to Eastham to borrow money. He told him he would buy cash notes at the usual discount. He was asked if he would take cash notes on J. C. Dews; he replied he would. J. C. Dews then made four notes of twenty-five dollars each, and one for twelve dollars and fifty cents, payable to John Dews, and these were by him indorsed and sold to Eastham for seventy-five dollars. All the parties then went before a justice of the peace, and the Dews permitted judgment to be rendered against them for one hundred and twelve dollars and fifty cents; Eastham was to wait four months. This was very properly held to be an usurious transaction. But if Eastham had known nothing of the transaction until the notes were brought to him, and he had purchased them, supposing J. C. Dews owed the money, the case would have been very different. It would be impossible, in such case, for him to be guilty of a contrivance to evade the law, and indirectly to reserve usurious interest.

But it is argued, that if usury enters into a contract between the original parties to a note, it follows the note into the hands of innocent assignees, and that by a parity of reasoning, the charge of his honor, in the case, was correct. It is certainly true, in the case stated, that the maker of the usurious note could avail himself of the defense, even against an innocent assignee, who might become the holder. And this is the decision in the case of *Tail v. Hannum*, 2 Yerg. 350. The reason is, that the note was void by the law, on account of the usury. And a void surety does not become binding by reason of having been indorsed to an innocent holder. But this reason has no application to the case now before us. This was no void surety in the hands of the plaintiff before he indorsed it to Ramsey. It received its taint, if at all, in the contract between these parties. But as the form of this contract is such as the law sanctions, to make it invalid, it must be shown that the parties intended that which the law forbids. As it regards the

second note, it is admitted there was usury, and it may turn out upon another trial, that Ramsey knew of, and entered into the contrivance by which the first note was made.

Let the judgment be reversed, and the cause be remanded for another trial.

USURIOUS SALE OF NOTE: See note to *Flemming v. Mulligan*, 13 Am. Dec. 710. Also, *Munn v. Commission Co.*, 8 Id. 219, and note; *Ruffin v. Armstrong*, 11 Id. 774, and note.

THE PRINCIPLE IS WELL SETTLED in Tennessee, that notes taken in business transactions may be sold at a greater discount than the legal rate of interest without becoming usurious. The distinction is between real-transaction paper and paper made for the purpose of raising money by a sale in the market. The latter is only a device to evade the statute against usury, and such paper is justly held tainted with usury. The principal case is cited to this effect in *Wetmore v. Bradley*, 3 Head, 727; *Fraser v. Syper*, 2 Heisk. 342; *Overton v. Hardin*, 6 Coldw. 377.

UZZELL v. MACK.

[4 HUMPHREYS, 319.]

SURETY DISCHARGING BOND OR JUDGMENT, which is the only security the creditor has taken, has nothing to which he can be subrogated.

SURETY, PAYING ANY PART OF BOND FOR PURCHASE MONEY, when vendor also reserved a lien upon the land, is subrogated to the vendor's rights under the lien.

BILL in equity. The court below dismissed the bill for want of equity. Complainant appealed. The other facts are stated in the opinion.

Nicholson, for the complainant.

Frierson, for the defendant.

By Court, GREEN, J. The complainant in this bill seeks to be substituted to the rights of a creditor, whose debt he has paid as a surety, to enforce the creditor's lien for the purchase money of the estate. The facts are shortly these: James R. Plummer purchased of Henry D. Houser, two lots in Columbia, for one thousand nine hundred and ninety-five dollars, to be paid in three annual installments, of six hundred and sixty-five dollars each. To secure these payments, he executed his three several notes, with P. Nelson and Elisha Uzzell as his sureties. A deed was made to Plummer by Houser, on the face of which it is stipulated, that Houser retains a lien upon the lots for the purchase money. Some time afterwards, Robert Mack purchased the lots from Plummer, at the price of two thousand

eight hundred dollars, and in part payment thereof, he took up the two last notes Plummer had given to Houser, and paid in cash three hundred dollars on the first note, which left upwards of three hundred dollars of the purchase money unpaid to Houser. Subsequently Plummer has become insolvent, and Uzzell has paid to Houser the balance due him for the lots, and for the payment of which he was bound as Plummer's surety. When Mack purchased the lots, he knew that a lien was retained by Houser, in the deed to Plummer, and he also knew that the purchase money had not all been fully paid.

There is no question, but that, as a general principle, sureties, who pay a debt, are entitled to stand in the place of a creditor, as to all securities or liens, which he may have against other persons or property on account of the debt. The only question here is, whether there was anything remaining after Houser's debt was paid, to which the surety, paying it, could be substituted. Where a surety pays a bond, or discharges a judgment, he extinguishes the only security the creditor has, and that being extinguished, there is nothing to which he can be substituted. But if the creditor has a security against another person, for the same debt, or upon other property, these being distinct from the obligation he held on the surety, the discharge of that obligation by the surety, does not extinguish such other security or lien; as against such security or lien the debt still remains. The surety who paid the creditor, is entitled to stand in his place, and to be substituted to all his rights. In the case before the court, Houser had two securities for his money; the bond of Plummer, Nelson, and Uzzell, and the lien reserved in the deed. When Uzzell, as Plummer's surety, paid the bond, that was extinguished, but the lien on the land is a distinct thing, constituting a different security, which the payment of the bond by Uzzell does not affect. Uzzell stands in the shoes of Houser, and the purchase money being unpaid, the lien on the land continues by the very terms of the deed.

We think this a clear case for substitution, and reverse the decree, and order that a decree be entered for the complainant.

SURETY ON PAYING THE DEBT IS SUBROGATED to the rights of the creditor as to all collateral securities, means, and remedies held by the latter for the enforcement of the debt: See *Cullum v. Emanuel*, 34 Am. Dec. 726, where the cases in this series are collected; also *Pott v. Nathan*, 37 Id. 456, and note.

THE PRINCIPAL CASE IS CITED in *Bitlick v. Wilkins*, 7 Heisk. 309, to the effect that when a surety discharges a judgment it is extinguished, and there is nothing to which he can be substituted. It is cited to the same effect in

Tobb v. Bank of Alabama, 2 Swan, 190; *Miller v. Porter*, 5 Humph. 298. The case of *Bittick v. Wilkins*, above mentioned, in citing the principal case and *Miller v. Porter*, explains them to "only hold that the surety is not substituted to the rights of the judgment creditor in such a sense as that an execution can be issued upon the judgment in his favor as an assignee of the judgment," but that he can be substituted to all collateral, funds, liens, or equities against any person or property, on account of the debt.

BAKER ET AL. v. DODSON.

[4 HUMPHREYS, 342.]

NUNCUPATIVE WILL, STATUTE OF TENNESSEE (code, section 2165) concerning, is sufficiently complied with, by decedent addressing himself to two witnesses, saying: "I wish to make a disposition of my effects." The language of the statute need not be used.

DODSON died, leaving only a wife, and brothers and sisters. On Monday night, while sick at his own house, he exclaimed, "I am gone—I am lost;" remained silent about fifteen minutes, then addressed two persons in the room, saying, "I wish to make a disposition of my effects," and proceeded to dispose of them. He died the following Friday. The widow offered this nuncupative will for probate. The brothers and sisters of Dodson contested the probate. Verdict was given establishing it, and motion for a new trial denied. The defendants appealed.

Thomas, for the plaintiffs in error.

Campbell, for the defendant in error.

By Court, REESE, J. The question in this case is embraced within narrow limits. It turns upon the sufficiency of the proof, and the accuracy of the charge to the jury as to what is technically called the *rogatio testium* of a nuncupative will propounded for probate. Two witnesses, John B. Hays and Laird H. Boyd, testified, that the deceased, addressing himself to them, said: "I wish to make a disposition of my effects"—and then went on to declare the nuncupation. They felt and understood themselves by such address to them, and the language used, to be called on specially to notice the factum of the will. The will being made, the deceased explained to them the reasons and motives which produced the particular disposition. There is no doubt, from the testimony of these witnesses, that it was the fixed purpose of the party to perform, and that he believed he was performing, a testamentary act. The leading object of the fifteenth section of the act of 1784, as to the special requirement to bear witness, or the *rogatio testium*, is

doubtless to distinguish between a valid nuncupation, and casual conversations by one in his illness, as to his wishes on the subject of his property, and to guard against the latter being imposed upon the court as testamentary. But it is not necessary for such purpose, that the testator (if he may be so called) should know or quote the very language of the statute. It is sufficient, if by intelligent act and language, he invoke their special attention and attestation to what he is going to say, or to what he has said. If he address them, and say, I wish to make a disposition of my effects, and go on then and make the factum of said disposition, we can not say, that the statute has not been complied with.

The court charged that it would be sufficient, if one witness heard and proved the *rogatio*; and such charge does not appear to be contrary to the authorities found in the ecclesiastical reports. This court said, in the case of *Tally v. Butlerworth*, 10 Yerg. 503, *obiter et arguendo*, that perhaps all the witnesses must hear and prove the *rogatio*. It may be, that this is not necessary. It is not material, however, as it seems to us, to decide the point: for here, two witnesses both heard and proved the *rogatio*.

Let the judgment be affirmed.

ROGATIO TESTIUM OF A NUNCUPATIVE WILL need not be in any set or particular form of words: See *Priscilla E. Yarnell's Will*, 26 Am. Dec. 115.

NUNCUPATIVE WILL, HISTORY AND FULL DISCUSSION OF: See note to *Sykes v. Sykes*, 20 Am. Dec. 44-48.

THE PRINCIPAL CASE IS CITED and approved in *Gwin v. Wright*, 8 Humph. 645; *Ridley v. Coleman*, 1 Sneed, 621; *Hatcher v. Millard*, 2 Coldw. 33; *Smith v. Thurman*, 2 Heisk. 114. In this last case, a witness said to the testator, who was on his death-bed, that "if he had any bequest to make, or wanted to make any disposition of his property, he ought to make it." He then said "he wanted Winton and Sally (two illegitimates) to have the land (which he had previously deeded to them), and to be made equal with the rest of his children:" held to be no *rogatio testium*, nor sufficient proof of the *animus testandi*. The principal case is also cited and approved in *Nolan v. Gardner*, 7 Id. 218.

RAINS v. MCNAIRY.

[4 HUMPHREYS, 356.]

CO-TENANT SELLING THE ENTIRE PROPERTY DOES NOT VEST in the purchaser any more than his own interest. The other co-tenant may so consider it, and take the property when opportunity offers; or he may sue in trover for the conversion, and thereby vest in the purchaser the entire property.

SHERIFF, UNDER FL. FA. AGAINST ONE CO-TENANT, levying on and selling their joint property, is liable to an action by the other co-tenant.

THE facts are sufficiently stated in the opinion.

Fletcher, for the plaintiff in error.

Ewing, for the defendant in error.

By Court, GREEN, J. Francis H. and John S. McNairy were joint owners of a jackass, upon which Rains, the sheriff, levied an execution in his hands against John S. McNairy. F. H. McNairy forbade the sale, claiming the ownership of one half; but the sheriff sold and delivered to the purchaser the whole jack; whereupon this action of trover was brought. The plaintiff recovered for one half the value of the jack in the circuit court, and Rains, the sheriff, appealed to this court. It is now insisted, that the sheriff had a right to take and deliver the jack to the purchaser, by virtue of the execution against John S. McNairy; that the purchaser became joint owner of the jack with F. H. McNairy, the sale of the entire property having, in fact, transferred only the one half; and as a consequence of these propositions, it is contended that there has been no conversion, and that no action lies by one tenant in common against the other. Each co-tenant having a right to the possession, can not be sued by the other part owner, unless there has been a conversion of the property; and the older elementary books hold, that a sale by one co-tenant of the entire property does not amount to a conversion, but that its destruction would.

It is argued that as the sale by one tenant in common of his co-tenant's share, passes the interest of the vendor only, the interest of the other co-tenant still remains in common with the purchaser, and therefore there can be no conversion by the act of sale: Bac. Abr., tit. Trover; ——— v. *Layfield*, Salk. 292; *Smith v. Oriell*, 1 East, 367; Litt., sec. 323. And this doctrine was maintained in the case of *Mersereau v. Norton*, 15 Johns. 179, where it was held, that a sale was not such a destruction of the property as to destroy the tenancy in common. But the more recent American cases hold, that as the assumption of authority over, and actual sale of the property by a stranger, will constitute a conversion, so the assuming authority to sell, and actually making sale of the interest of another under a claim of title in the vendor, although he be part owner, may be taken to be a conversion, for which an action of trover will lie: *Weld v. Oliver*, 21 Pick. 559; *White v. Osborne*, 21 Wend. 72; *Melville v. Brown*, 15 Mass. 82; *Lucas v. Wasson*, 3 Dev. 398 [24 Am.

Dec. 266]. It is true, such sale does not vest in the purchaser any greater interest than that of the party making the sale; and the co-tenant, who is not consulted, may so consider it, and take the property when opportunity offers; but he may sue in trover for the conversion, and thereby vest in the purchaser the entire property: *White v. Osborn*, 21 Wend. 77.

In a late case, *Waddell v. Cook*, 2 Hill, 47 [37 Am. Dec. 372], an action of trespass was sustained against the marshal, Waddell, for seizing and selling goods of Cook under a *fi. fa.* against Bowne, who was a joint owner of the goods with Cook. The court held, that though the marshal's authority extended to a total dispossession of both the co-tenants by an execution against one, yet the law denied him the right to sell the entire property. "In attempting to do so, though the act be nugatory, yet the law may well treat it as such an abuse of legal authority, as renders him a trespasser *ab initio*:" 2 Kent, 351, note b, 4th ed.

We therefore think this action was well conceived, and affirm the judgment.

SALE OR DESTRUCTION OF COMMON PROPERTY BY ONE CO-TENANT will make him liable to an action of trover or trespass by the other co-tenant: See *Lucas v. Wasson*, 24 Am. Dec. 286; *Bell v. Lyman*, 15 Id. 83; *Hyde v. Stone*, 22 Id. 582. See *contra*, as to a sale, *Welch v. Clark*, 36 Id. 368. For discussion of, when trespass will lie by one co-tenant against another, see note to *Porter v. Hooper*, 29 Id. 483.

THE PRINCIPAL CASE IS CITED to the effect that a sale by one tenant in common, of the entirety of the chattel, is such a conversion as will entitle the other to maintain trover, in *Cheek v. Wheatley*, 3 Sneed, 492; *Cunningham v. Wood*, 4 Humph. 419; *Logan v. H. C. & S. Coal Co.*, 9 Heisk. 690.

HERRING ET AL. v. POLLARD'S EX'RS.

[4 HUMPHREYS, 362.]

PARTY MAKING IMPROVEMENTS UPON THE LANDS OF ANOTHER, his possession being *bona fide* under a contract to purchase, which is void because not in writing, can recover in a court of equity the value of such improvements.

BILL in equity. The facts appear in the opinion.

Kimble, for the complainants.

Johnson, for the defendants.

By Court, GREEN, J. The complainants agreed, verbally, to purchase a tract of land, in Montgomery county, from the de-

fendant, and in part payment therefor conveyed and delivered to him a negro woman and child, at the price of eight hundred dollars. They went into possession of the land and made valuable improvements. They also enjoyed the farm, and sold a quantity of valuable timber. When a written contract was about being made between the parties, a misunderstanding of each other existed; the complainants insisting on having a deed, and the defendant being willing only to give his bond for a title when the purchase money should be paid. Whereupon the complainants filed this bill, asking to be restored to the enjoyment of the property that had been delivered to the defendant in payment of the land, and for compensation for improvements made upon the land. The chancellor decreed a rescission of the contract as to the negroes; and that they be delivered to the complainants; that an account be taken, in which the complainants should be allowed for the value of improvements put upon the land and for the hire of the negroes; and should be charged for the rent of the land, and the value of timber sold by them. The defendant appealed to this court.

The only question which is now made is, whether the complainants are entitled to compensation for improvements. It appears from the bill, answer, and proof in the cause, that the complainants went into possession of the land in good faith, under an agreement to purchase. The execution of the bill of sale, and delivery of the negroes to the defendant, in part payment for the land, furnish conclusive evidence, that the complainants intended, *bona fide*, to fulfill their agreement, and receive a title for the land. As to the subsequent misunderstanding of the parties, it is not necessary to inquire. The contract was void; not having been in writing. And the question is, whether a party, who has made improvements on the land of another, his possession having been *bona fide*, can come into a court of equity for improvements. It is not controverted, but that if the owner of the land, were, in such case, to come into equity, seeking an account, the defendant would be permitted to deduct therefrom, the full amount of all meliorations and improvements which he has beneficially made upon the estate. This would be done upon the old and established principle, that he who seeks equity, must do equity: 2 Story's Eq. Jur., sec. 799.

But it is supposed, that courts of equity ought not to go further, and to grant active relief in favor of such *bona fide* possessor, by sustaining a bill for improvements, brought by him against

the true owner, after he has recovered the premises at law. This opinion, entertained by Chancellor Walworth, *Putnam v. Ritchie*, 6 Paige's Ch. 390, is controverted by Mr. Justice Story, in a very able opinion, delivered by him in the case of *Bright v. Boyd*, decided in the federal circuit court for the district of Maine, and reported in 1 Story, 478, 491-493. In neither case is any other authority referred to. And it is stated, that no case in England or America can be found, where this point has been decided either way. Judge Story says: "It appears to me, speaking with deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate, by his meliorations and improvements, is contrary to the first principles of equity. To me it seems manifestly unjust and unequitable, thus to appropriate to one man, the property and money of another, who is in no default." We concur in these views of the learned judge, whose opinion has been quoted, and are, therefore, of opinion, that the complainants were entitled to such improvements as have enhanced the value of the land. No question is here raised, as to the amount which was allowed, or of the correctness of the account in any particular.

Let the decree be affirmed.

EQUITY COURTS WILL GIVE COMPENSATION FOR IMPROVEMENTS made by a *bona fide* possessor: See note to *Jackson v. Loomis*, 15 Am. Dec. 352, under title "Rule in Equity;" and for a still more extended discussion, see note to *Scott v. Dunn*, 30 Id. 177. To the same effect the principal case is cited in *Mathews v. Davis*, 6 Humph. 327; *Humphreys v. Holtzinger*, 3 Sneed, 229; *Rhea v. Allison*, 3 Head, 178; *Rainer v. Huddleston*, 4 Heisk. 228.

TAYLOR'S LESSEE *v.* COZART.

[4 HUMPHREYS, 433.]

LEVY IS VOID FOR UNCERTAINTY, IN THE WORDS, "Levied this execution on three tracts of land; one tract containing three hundred acres, one tract forty or fifty acres, one other tract containing one hundred and ten acres, as the property of Haywood Cozart, all in the county of Carroll. See advertisement in newspapers for description."

DESCRIBING LAND LEVIED UPON BY MERELY REFERRING TO ADVERTISEMENT in paper is not sufficient, and the levy is void for uncertainty; *aliter*, if the reference had been to a deed of record, or facts on the ground capable of proof.

EJECTMENT. Plaintiff offered newspapers of the date of the levy, containing full description of the land. Court rejected the evidence as inadmissible. Verdict for defendant.

Parall, for the plaintiff.

Bullock and Burrow, for the defendant.

By Court, GREEN, J. This is an action of ejectment. The plaintiff claims title by means of a sale by the marshal, made by virtue of an execution against Haywood Cozart and others. The levy is in the following words:

"Levied this execution on three tracts of land; one tract containing three hundred acres; one tract forty or fifty acres; one other tract containing one hundred and ten acres, as the property of Haywood Cozart, all in the county of Carroll. See advertisement in newspapers for description. 25th January, 1841.
ROBT. I. CHESTER, M. W. D."

This levy is too vague and uncertain to afford any information by which to identify the land. It could not authorize a sale, and the deed of the marshal conferred no title on the purchaser. See the cases of *Pound v. Pullen*, 3 Yerg. 338; *Brown v. Dickson*, 2 Humph. 395 [37 Am. Dec. 560]; and *Huddleston v. Garrett*, 3 Id. 629.

But it is said, the reference in this levy to an advertisement in the newspaper, takes this case out of the operation of the rule established in the cases above referred to. We do not think this reference helps the levy in the least degree. It does not appear what advertisement is referred to. Whether the one the marshal intended himself to publish in this case, or some other advertisement about the same land. And hence no assistance can be gained from that reference. But if the reference to an advertisement had been as specific as it could have been made, it would not be sufficient. The advertisement forms no part of the record; exists only in the evanescent publications of the day, and must soon be lost to the memory of man, and become incapable of proof. Had reference been made to a deed of record, or to facts on the ground, capable of proof, the case would have been wholly different.

Affirm the judgment.

IN RETURN OF EXECUTION, TECHNICAL ACCURACY OF DESCRIPTION is not required, but it must be sufficient to enable the property to be identified: *Duwall v. Waters*, 18 Am. Dec. 350. See also, upon sufficiency of description in a return, *Swan's Lessee v. Parker*, 27 Id. 522; *Berry v. Griffith*, 18 Id. 310; *Webb v. Bumpass*, 33 Id. 310; but return, "Levied on lot No. —, in town of Greenville, with its improvements," is void for uncertainty: *Brown v. Dickson*, 37 Id. 560; so a levy on part of a tract without describing which part, is void: *Waters v. Duwall*, 33 Id. 693. Description is sufficiently certain if it can be made so by reference to a record: *Gilman v. Thompson*, 34 Id. 714.

CITED in *Brigance v. Erwin's Lessee*, 1 Swan, 378, to the effect that parol evidence is inadmissible to show the identity of the land. In this case the return was: "Levied 20th of August, 1825, on one thousand nine hundred and fifty acres of land in Henderson county, part of tract of two thousand five hundred acres located by Daniel Gilchrist." It was held void for uncertainty. In *Lafferty v. Conn*, 3 Sneed, 225, the only description given was, "three hundred and fifty acres of land, the property of Edmond Collins," and it was held void, the principal case being cited as authority. But it has been held, that if the return only shows the number of acres, but states that a list of the advertisement and description of the land is thereto annexed, and then sets out a copy of the advertisement containing a full description of the land, it is a sufficient levy: *Gibbs v. Thompson*, 7 Humph. 181.

COONEY v. WADE.

[4 HUMPHREYS, 444.]

CONSTABLE, RECEIVING NOTE TO COLLECT, IS AN AGENT of the creditor to receive payment therefor, but can only receive it in money.

CONSTABLE, HAVING NOTE TO COLLECT, CAN NOT DISCHARGE THE DEBTOR by giving him receipts and assume the debt himself.

THE jury in the circuit court returned a verdict that the judgment had never been paid, and the court ordered a *procedendo*. Other facts are stated in the opinion.

Totten, for Wade.

Fitzgerald and Harris, for Cooney.

By Court, GREEN, J. In this case, it appears that Cooney placed a note on Wade in the hands of McBride, a constable, for collection. Wade was sued, and a judgment obtained. He then placed several notes in the hands of McBride, the constable, to be by him collected and applied to the satisfaction of Cooney's debt. These notes were collected by McBride, and the money was used by him. After the money was so used, and after he went out of the office of constable, McBride executed to Wade receipts for the sums so collected and used by him, as so much money paid in discharge of Cooney's judgment. Cooney having received no part of his money, caused an execution to be issued against Wade, who applied for a *supersedeas*, and brought the cause into the circuit court. The court was of opinion, that the reception of Wade's money by McBride did not constitute a payment to Cooney, and that McBride had no power to discharge Wade's liability by the receipt he gave him for the money he had collected and used. Wade appealed to this court.

We think there is no error in the record. It is true, that McBride was Cooney's agent, and had a right, as such, as well as by his office of constable, to receive his money and give Wade an acquittance therefor; but he had no power to receive payment in anything but money. In taking the notes from Wade, they did not become the property of Cooney. McBride had no power to make them such, by any contract with Wade; nor indeed did he assume to do so. He undertook, as Wade's agent, to collect the notes, and apply the money to Cooney's debt. Until collected and so applied, the notes and the money that was received upon them belonged to McBride. But while it was in McBride's hands, as Wade's money, it was used by him. When he executed the receipts, no money was paid, nor did he have any in his hands belonging to Wade. He was Wade's debtor to the amount of money he had used; and this debt, it was agreed, should be regarded as money in his hands for Cooney. This McBride had no right to do. He had no power to discharge Cooney's debt by assuming the debt himself; and this was in effect the transaction.

Let the judgment be affirmed.

SHERIFF HAVING AN EXECUTION CAN NOT ASSUME THE DEBT HIMSELF, and give the debtor a receipt in consideration of the settlement of a private indebtedness between them: *Miles v. Richwine*, 19 Am. Dec. 638, and note.

In *Kenny v. Hazeltine*, 6 Humph. 63, it was held that an attorney having a note to collect could receive payment only in money, and if he received from the debtor notes, he collected them as the agent of the debtor, and they did not discharge the creditor's note until some act of appropriation to that purpose by the attorney or the debtor. An agent can receive payment only in lawful currency. Illegal or unlawful money, as in this case of confederate treasury notes, will not discharge the debt: *Shurer v. Green*, 3 Coldw. 426; *Scruggs v. Luster*, 1 Heisk. 154; *Clark v. Thomas*, 4 Id. 422; *King v. Fleece*, 7 Id. 226; all citing the principal case.

DEGRAFFENREID v. SCRUGGS.

[4 HUMPHREYS, 451.]

FIXTURES—AS BETWEEN VENDOR AND VENDEE, THE ANCIENT RULE, that whatever is affixed to the freehold passes with it, has not been relaxed. **GIN-MILL**, AS BETWEEN VENDOR AND VENDEE, PASSES WITH THE FREEHOLD, if erected in the gin-house and fastened to it by nails and braces.

TROVER to recover value of a gin-mill. Plaintiff recovered judgment for one hundred and twenty-one dollars. Defendant appealed. The facts sufficiently appear in the opinion.

Searcy, for the plaintiff in error.

No counsel appeared for the defendant in error.

By Court, GREEN, J. This is an action of trover, brought under the title of the vendor of a tract of land, against the vendee of the land, for a cotton-gin, that was erected on the land and affixed to the gin-house. The court charged the jury, that if the gin could be severed and removed without serious injury to the land or gin, that it would not pass under the deed, and they must find for the plaintiff. The jury found a verdict for the plaintiff, and the defendant appealed in error to this court.

The original rule of the common law was, that everything which was affixed to the freehold was subjected to the law governing the freehold. But in later times this rule has been greatly relaxed in favor of tenants, and in relation to fixtures erected for the purposes of trade. But as between executor and heir, and between the vendor and vendee, the original rule prevails, that whatever is affixed to the freehold passes with it. In this case, the gin was erected in the gin-house, and fastened to the house by nails and braces. It was therefore permanently attached and fixed to the freehold, and this is the true and certain criterion to determine whether it passed by the deed with the freehold: *Walker v. Sherman*, 20 Wend. 636; 2 Kent's Com., 3d ed., 345, 346. Any attempt to carry out the principle stated by his honor to the jury, would be attended with endless difficulty and uncertainty. If fixtures attached to the freehold may be removed, provided they can be severed without injury to the land, scarcely a case could occur in which they would pass by the deed.

We think the court erred in the charge to the jury, and reverse the judgment and remand the cause.

FIXTURES, WHAT ARE, WHEN ERECTED BY THE OWNER OF THE FREEHOLD: For full discussion, see note to *Gray v. Holdship*, 17 Am. Dec. 686. That the ancient rule concerning fixtures has not been relaxed between vendor and vendee, see *Farrar v. Stackpole*, 19 Id. 201; *Voorhis v. Freeman*, 37 Id. 490; *Despatch Line v. Bellamy M. Co.*, Id. 203, and cases collected in the note; *Pyle v. Pennock*, Id. 517; also *Ward v. Collom*, 2 Coldw. 354; *McDavid v. Wood*, 5 Heisk. 98; *Cannon v. Hare*, 1 Tenn. Ch. 26, all citing the principal case.

PAYNE v. PAYNE.

[4 HUMPHREYS, 500.]

DIVORCE FOR CRUELTY—WHERE HUSBAND USES LANGUAGE TO HIS WIFE NOT

USUAL to be addressed to slaves, threatens to drive her from the house, slaps her, chokes her, has an ungovernable passion, and prays God in her presence to deliver him from her, the wife is entitled to a divorce in Tennessee.

COMPLAINANT abandoned defendant and filed this bill for a divorce and alimony, on account of his personal indignities and abuse. Bill was dismissed and complainant appealed. Other facts are stated in the opinion.

W. T. Brown, for the complainant.

No counsel appeared for the defendant.

By Court, GREEN, J. This is a bill for divorce, alleging that the defendant has been guilty of gross abuse of the complainant, and of personal violence; so that her situation was rendered intolerable, compelling her to withdraw from his society. The defendant's answer denies the use of abusive language, or that he has been guilty of personal violence towards the complainant, except that in one instance, when greatly irritated, he slapped her face with his hand.

There is much evidence in the record, in relation to the conduct of the parties towards each other; but it is unnecessary to analyze the proof particularly, with a view to arrive at a correct conclusion in the case. One or two of the witnesses speak of the complainant as high-tempered, and doubtless, under the influence of the irritating indignities which the defendant was in the habit of inflicting upon her, she sometimes felt and exhibited resentment. But the great body of testimony from witnesses who have known her from early girlhood, establishes for the complainant a most exemplary character. Ladies of the highest respectability, her early companions, say she was sensible, well-informed, and most amiable in her disposition and temper. Gentlemen in the first walks in society, in whose families she was intimate during her cohabitation with the defendant, gave her the same character. Both parties were members of the Methodist church. The ministers of that church, and other members, speak of the complainant's Christian character in the highest terms; but of that of the defendant in equivocal language. The defendant was peevish and ill-natured, given to scolding and fault-finding. In an interview with the complainant, after

the separation, he admitted, in presence of Mr. Littlejohn, that he had threatened to drive complainant from his house, but that he would have her debts to pay; and that he was in the habit of using such language to her, as is not usual to be addressed to slaves. To Mr. L. P. Williamson, he admitted he had slapped her, and when charged with having also choked her, he evaded, but did not deny it.

To Mr. James M. Williamson, he admitted, that he had, at family devotion, prayed the Lord to deliver him from his wife, in whatever way he may think best; and this he justified to Mr. Williamson, saying the prayer was right. As to the indignities of language, and personal violence, he excused himself by alleging, that he was in a passion. But as to the prayer, infinitely the greatest indignity of them all, to a pious and sensible mind, he had the audacity not only to avow the fact, but to justify it. If, as there is reason to suppose from his attempt at justification, he really felt the desire expressed in his prayer, the safety of the complainant was in jeopardy while cohabiting with him. He sets up as matter of defense, his unfortunately irritable and ungovernable temper. If there was a strong desire to get rid of his wife, obtaining utterance in prayer, this ungovernable temper might engage his own hand in the execution of his wish. We all know how much the judgment is perverted and the conscience weakened, under the influence of a strong desire to sin; and in this case, such an influence might soon make the thought father to the deed. But if no such settled feeling existed, and the prayer was only intended for the ear of his wife, with a view to irritate and wound her feelings, language is wanting to express the indignant reprobation which every virtuous mind must feel, at the brutality, the hypocrisy, and the profanity of the act. He is a member of the church; his wife is also a member, most exemplary and pious. She surrounds the family altar as a matter of duty and pious privilege, while he, profanely calling upon God, insults her, by expressing his wish that she should be removed from him; and this she is compelled to hear, causing her own feelings, which would have been employed in pious devotion, to be outraged and insulted. I know not what course of conduct would render the situation of an educated, sensitive, and polished lady intolerable, if that adopted by this defendant shall be considered as inadequate to effect such an end. He is in the habit of using language to her, which a gentleman will not employ to his slaves; he threatens to drive her from his house; he slaps and chokes her; and, at the family altar, in her

presence he prays God to deliver him from her. We think she would ill deserve the character of refinement, sensibility, and lady-like feeling, which the witnesses give her, if she did not feel that to remain in his house, and endure all this, was intolerable.

By the act of 1841-2, c. 183, the court is authorized to decree a divorce from the bonds of matrimony in all cases, where by the act of 1835 a divorce was authorized from bed and board; and we think, upon all the facts of this case, the complainant is entitled to such a decree. Let the master report what property the defendant received by his marriage with the complainant, and which he yet owns, and let the whole of it be vested in a trustee, for the use and support of the complainant and her children.

Reverse the decree of the chancellor, and decree as above directed.

CRUELTY AS GROUND FOR DIVORCE: See, for a full discussion, note to *Peer v. Peer*, 29 Am. Dec. 674-679.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

CHIPMAN v. BATES.

[15 VERMONT, 51.]

IT IS NOT A PREREQUISITE TO THE ISSUANCE OF A SEARCH WARRANT for stolen goods that any steps should be taken to inaugurate a prosecution against the party guilty of the theft; all that is required is an affidavit before a proper officer showing that the goods have been stolen, and that the applicant has sufficient grounds to believe that they are concealed in a place which he desires searched.

NO RETURN IS REQUIRED UPON A SEARCH WARRANT, if the goods are not found.

PLEA OF JUSTIFICATION, IN AN ACTION OF TRESPASS, UNDER A SEARCH WARRANT, interposed by the party at whose instance the writ issued, need not show that there were sufficient grounds for its issuance.

SEARCH WARRANT IS A SUFFICIENT JUSTIFICATION, THOUGH THE STOLEN GOODS ARE NOT FOUND, even to the party at whose instance the writ issued, for an entry upon the suspected place, where the doors are found open and the entry is peaceable; whether it would be a justification where the doors are found closed and are broken down, not decided.

TRESPASS for breaking and entering into plaintiff's dwelling-house. To the last count of the declaration defendant pleaded a justification under a search warrant. The plea set forth that, prior to the supposed trespass, a ram was stolen from defendant; and that the latter, having sufficient reason to believe it concealed by plaintiff in his dwelling-house, with a knowledge that it was stolen from defendant, made affidavit to that effect before a justice of the peace, and obtained from him a search warrant directed to a constable of the county, commanding him to make search for the stolen goods in the dwelling-house of plaintiff during the day-time; that thereafter said constable, and

defendant as his servant, had entered into the dwelling-house of plaintiff during the day-time, at a time when the doors thereof were found open, and had prosecuted the said search without doing any unnecessary damage; and that this said entry and search constituted the trespass complained of. A demurrer was interposed to this plea, and sustained.

C. D. Kasson, for the defendant.

J. Maeck, *contra*.

By Court, WILLIAMS, C. J. The third count in the declaration is in trespass for breaking and entering the dwelling-house of the plaintiff. The plea justifies the breaking, etc., under a search warrant. This plea is demurred to. A warrant of this description is recognized both by our constitution and laws, and the authority of a justice of the peace to issue such a warrant has never been questioned. The constitution requires, that such warrants shall not issue, without oath or affirmation first made, affording sufficient foundation for them; and the oath must disclose that goods have been stolen, and that the applicant suspects they are concealed in a place, which he wishes to have searched. We do not discover either from the nature of the process, or from the forms, that it is necessary, that any complaint should be signed by the applicant, nor that any minute should be made of the day, month, and year, when presented; or that any recognizance for cost should be given, or that it should be returned, if the goods are not found. Indeed, these requirements are only necessary, when a complaint is made, which is intended to be the incipient step, in a prosecution against any one for an offense. The object of a search warrant is, to obtain the goods, and to bring the person, in whose custody they are found, either to be recognized as a witness, or to be subject to such further proceedings as the ends of justice may require. The magistrate must determine whether there are sufficient grounds to require the issuing of the warrant; and these grounds need not and can not well be stated, in a plea justifying proceedings under the warrant. The mere formal objections to the validity of the plea have not, therefore, stood in the way of our determining its sufficiency on its merits. The main and important question is, whether, as it is not stated in the plea, that the stolen goods were found, the warrant will justify the person who procured it to be issued. The authority of a sheriff, or other officer, in the execution of a search warrant is, to enter the house in the day-time, the doors being open, and make search

for stolen goods; and thus far, he has the same authority as he has in the service of civil process; by virtue of which he may peaceably enter the dwelling-house, to serve the same, the doors being open. He may, however, do something more to execute a search warrant. He may break open the doors to execute the same, if admittance is denied, and whether the goods are found or not, the officer and his assistants are justified. But, according to the opinion of Lord Hale, the party who prays it out, is liable in an action of trespass, if the goods are not found. And indeed it would seem to be reasonable, that, as in every case, a person who is proceeded against, on the complaint of a private individual, is to have indemnity for his costs, so in this case, he should have redress for any injury he may sustain, if the complaint is unfounded, without any inquiry as to the motives which led to the prosecution, except so far as they might enhance or lessen the damages. The opinion of Lord Hale has been questioned and directly overruled in the case of *Beatty v. Perkins*, 6 Wend. 382; and were it necessary, in this case, to reject the authority of Lord Hale, and adopt the principle of the case last mentioned, the court are divided in opinion, and this cause would be postponed for further argument. I, for one, should be disposed to recognize this opinion of Hale, as the safer and better law, and, indeed, as the settled doctrines of the common law, from which we are not at liberty to depart.

Lord Hale says, 2 P. C. 151: "Whether the stolen goods are in the suspected place or not, the officer and his assistants, in the day-time, may enter *per ostia aperta*, to make search; and it is justifiable by this warrant. If the door be shut, the officer, after demand to open it and refusal, may justify breaking the door whether the stolen goods are there or not; but as to the party, upon whose suggestion the warrant issued, the breaking the door is, *in eventu*, lawful or unlawful; viz., lawful, if the goods are there, unlawful if they are not there." From this opinion it seems the party is only liable, when the doors are forcibly broken open; and there can be no good reason why, as to the officer and party, the entry without force, the doors being open, should not be justified, as it would be, in case the officer entered to serve civil process. The owner of a dwelling-house has the privilege of closing his doors, to protect his family in every case, except when the administration of public justice requires that they should be opened, even against his will. The reason given for this, is, "that the family within doors shall not be left naked and exposed to robbers from without." But if his

doors are left open, he permits them to be thus exposed, and every part of his dwelling-house is within the precinct of an officer, who has either civil or criminal process to be executed therein. In the plea in this case, it is averred that the entry was peaceably made, the doors being open; and any forcible breaking open of any doors is denied; and on this ground, we are of opinion that it discloses a sufficient justification. The judgment of the county court is, therefore, reversed, and judgment must be rendered for the defendant to recover his cost, as the other issues were found in his favor in the court below.

SEARCH WARRANTS.—Search warrants appear not to have been known to the common law: 4 Inst. 176; but their usefulness soon forced their recognition, and their lawfulness was admitted in the case of *Entick v. Carrington*, 2 Wils. 291; 11 Harg. St. Tr. 321. There is no doubt that an officer to whom a search warrant is issued may justify thereunder, in the like manner as under any other process. It follows, then, that if he acts in obedience to a warrant regular and valid upon its face, he incurs no liability, however irregular and erroneous have been the proceedings upon which the writ was based. He may, therefore, if admittance to the suspected place is denied to him, break open the doors, and will be justified even though the suspected goods are not found: 2 Hale's P. C. 151; *Bell v. Clapp*, 10 Johns. 263; S. C., 6 Am. Dec. 339; *Cooper v. Booth*, 3 Esp. 135; *Entick v. Carrington*, 2 Wils. 275; 2 Bl. 912; *Androsoggin R. R. Co. v. Richards*, 41 Me. 233. This latter case holds that a demand is necessary prior to a breaking in of the doors, only where some person is found in charge of the building to be searched. The officer, however, can of course only be justified if he follows the directions of the writ. Thus, if the writ direct the seizure of sugar, a seizure of tea constitutes the officer a trespasser: *Price v. Messenger*, 2 Bos. & Pul. 158. So he must be particular to follow the directions of the warrant with respect to the place to be searched. A warrant to search the dwelling-house of A. does not authorize the search of a house in the occupation of B., though it belong to the former. The officer will be justified in the seizure of goods under a warrant, though they were not those intended by the applicant, if they come within its description: *Stone v. Dand*, 5 Metc. 98. It is absolutely essential to the validity of warrants of this kind that they contain a particular description of the place to be searched. Thus a warrant to search for and seize property in the possession of A. B. is void, and can not justify the officer who undertakes its execution: *Reed v. Rice*, 2 J. J. Marsh. 45; *People v. Holcomb*, 3 Park. C. C. 656.

It seems to have been once thought, that in the case of a warrant issued for the search of stolen goods, the informer was justified or not, according to the result; that if the goods were not found, the search was, as far as he was concerned, unlawful, but if found, lawful: *Bostock v. Saunders*, 3 Wils. 434; and in 2 Hale's P. C. 151, it is said that if the doors be broken to effect the search, the applicant for the warrant will not be justified in case the goods are not found. *Bostock v. Saunders*, *supra*, was overruled in *Cooper v. Booth*, 3 Esp. 135; but no case has arisen which absolutely required the decision of the question as to whether trespass would lie against the person who has caused a search warrant to issue, if the process be regular upon its face. *Beatty v. Perkins*, 6 Wend. 385, discussed the question at some length, and

though as the entry there was peaceable the conclusion was unnecessary, the court was clearly of opinion that the *dictum* of Lord Hale was wrong, and that even though doors be broken down, the applicant for the warrant could not be sued in trespass, and that in case the writ was obtained by malicious and false pretences the action must be case.

SMITH v. PETTINGILL ET AL.

[15 VERMONT, 82.]

REMEDY BY INJUNCTION DOES NOT LIE TO PREVENT a mere ordinary trespass, where the injury that may be done is not irreparable and where a recovery in damages affords an adequate remedy.

IDEM—EQUITY WILL NOT INTERFERE TO RESTRAIN THE BREACH OF A CONTRACT or to redress it, where the remedy at law is adequate.

BILL for an injunction. In 1839 the orator, Smith, demised to defendant Pettingill a certain farm in Milton. One of the conditions of the lease was that if the demised farm did not produce during any season sufficient hay for the support of a specified number of cattle, then the lessee should have the right to make the deficiency good by cutting hay upon the Colchester meadows. The farm having failed to produce the amount of hay mentioned in the lease, defendant Pettingill claimed the right to make up this deficiency by cutting hay from the Colchester meadows, and had, at the time this bill was filed, sold part of the hay claimed by him to the other defendants, to be cut from the said meadows. Plaintiff contended that the case only authorized the cutting of hay to be fed to stock upon the demised premises, and not to be sold, and prayed for an injunction against the further cutting or removal of any hay to be sold. The bill was dismissed by the chancellor below.

J. Maeck, for the orator.

Allen and Platt, for the defendants.

By Court, REDFIELD, J. It is not necessary to go into the question of the construction of the contract, as, in any view which can be taken of the case, the plaintiff must have an ample remedy at law, either in trespass for entering upon his land and cutting hay in a manner, and for a purpose, not within the fair construction of the contract; or else, for a violation of the contract, in cutting more hay than was necessary for the purposes for which the license was given, or for failing to apply it to the purposes therein contemplated. But a court of chancery will never interfere to prevent, by injunction, a mere ordinary

trespass where the injury would be in no sense irreparable, and where an adequate remedy might be found in the recovery of damages. Injunctions to restrain or prevent trespasses have been granted only when the impending injury was to timber, ore, monuments, ornamental trees, coals, and quarries: 2 Story's Eq. Jur. 207-209, and cases there cited. In most of these cases, the recovery of damages merely, would be an insignificant or very inadequate remedy. The doctrine in regard to this subject is elaborately discussed and placed upon its true ground in the case of *Jerome v. Ross*, 7 Johns. Ch. 315 [11 Am. Dec. 484]. By reference to the cases there cited, it appears that the entire jurisdiction of courts of chancery in cases of trespass, is of very recent origin.

A mere breach of contract is never restrained in advance, or redressed subsequently, in a court of equity, where the remedy at law is adequate to the injury. This case, in this aspect, is not very dissimilar to that of *Titus' Ex'r v. Washburn*, 9 Vt. 211.

Decree of the chancellor affirmed.

INJUNCTION AGAINST APPREHENDED TRESPASS can issue only in an extreme case, where the injury threatened is irreparable, and the title to the land is unquestioned: *Nevitt v. Gillespie*, 28 Am. Dec. 696; *Jerome v. Ross*, 11 Id. 484, and note; *Lining v. Geddes*, 16 Id. 606; *Hart v. Mayor*, 24 Id. 165; *Quackenbush v. Van Riper*, 29 Id. 716.

BAKERSFIELD CONGREGATIONAL SOCIETY v. BAKER.

[15 VERMONT, 119.]

TRESPASS QUARE CLAUSUM FREGIT CAN BE MAINTAINED ONLY by the owner of the fee or by one in exclusive possession of the premises entered upon.

IDEM—A RELIGIOUS SOCIETY ENTITLED TO THE USE OF A MEETING-HOUSE for all religious purposes, but who are not the owners of the fee therein, this being a separate society composed of the pewholders in the meeting-house, can not maintain an action of trespass *quare clausum fregit* for a breaking and entering into the meeting-house whereby the exercise of their right was interrupted.

TRESPASS *quare clausum fregit*. The *locus in quo* was the meeting-house of the Congregational Society of Bakersfield. On a certain Sabbath defendants Baker and Potter, the former a minister of the order of Universalists, entered into said meeting-house, before the congregation of Congregationalists had assembled, and Baker proceeded to celebrate divine service therein. Owing to this action of defendants the Congregationalists were prevented from using the meeting-house on that day. This

meeting-house was built by the Union Society of Bakersfield. The members of this society were the pewholders in the meeting-house, and the money necessary to its erection was obtained by the sale of pews. The object of the Union Society appeared from their constitution to be the building of a meeting-house "exclusively for the use of the Religious Congregational Society in Bakersfield." Immediately after the erection of the meeting-house it had been dedicated in the manner peculiar to the order of Congregationalists, and ever since to the time of the alleged trespass plaintiff had held its meetings for religious worship therein, both on the Sabbath and on the other days that it chose, and though meetings had occasionally been held therein by other denominations, these had all, prior to the time of the alleged trespass, been with its consent. Defendant Potter was a pewholder in the meeting-house and a Universalist, and, together with other pewholders of the same denomination, contended that he and they were entitled to the use of the meeting-house for religious purposes, for a time to be determined by the proportion borne by their pews to the whole number. Defendants contended, and upon the trial asked for instructions to the effect, that the remedy for plaintiff, if any, was not by action *quare clausum fregit*. These instructions were refused, and a verdict directed by the court below in favor of plaintiff.

H. R. and J. J. Beardsley and T. Child, for the defendants.

J. and J. G. Smith, for the plaintiffs.

By Court, WILLIAMS, C. J. This is an action of trespass, *quare clausum fregit*, for breaking and entering a certain meeting-house in Bakersfield. To maintain this action, it is necessary that the plaintiffs should have, either the exclusive possession of the *locus in quo*, or, be the owner thereof, and no adverse possession in any other person; and this will lead to the inquiry—in whom was the fee of the place, etc., at the time of the alleged trespass? or, in whom was the fee, and, in whom was the possession? The plaintiffs are an organized society, or body corporate; and there is, also, another organized society, or body corporate, in the same town, by the name of the Union Society, who claim to be the owners of the meeting-house in question. From an examination of all the papers in the case, it is evident, that the fee of the land, on which the meeting-house stands, as well as of the meeting-house, is in the association, formed under our statute, called the Union Society. In England, the soil and freehold of the church, is in the parson, who is a sole corpora-

tion. In this country, it depends on the contract and agreement which may be made when the church is built. Where parishes are incorporated, and churches are built for them, the fee is usually in them, as it commonly is, or was, in Massachusetts and Connecticut; and this must be the meaning of Chief Justice Swift, in his digest, where he says, the fee is in the congregation. The congregation, as such, are not capable of taking a fee. As many of our meeting-houses are now built, the fee may be in one corporation, while the use, and enjoyment, may belong to another. In such cases, those, for whose benefit they are erected, and who are entitled to the use, and enjoyment of the same, can not be disturbed, or interrupted therein, without having an appropriate remedy.

By the articles of association, and by the subscription, under which the meeting-house in question was built, the several pewholders, from time to time, were the owners of the fee, and might be composed of different members from those which composed the other association, who, also, have a corporate existence, called the Religious Congregational Society. The Union Society, being the owners of the freehold, can, alone, maintain an action of trespass, *quare clausum fregit*, against any one, for breaking and entering the meeting-house, unless they have given to the latter society the exclusive possession of the same. This they have not done, nor consistently with their articles of association, or by-laws, could they do. The several pewholders had a right to their pews and seats in the house, of which they could not be divested, except by their own consent. The Religious Congregational Society are entitled to the use and enjoyment of the house for all religious purposes, for performing divine service, for prayer, for praise, for speaking and hearing the word of God, according to the usages and customs of a Congregational society; and if they are disturbed or interrupted therein, they have a remedy, but not by an action of trespass, *quare clausum fregit*. That the right to the use of a house for such, or similar purposes, will not enable them to maintain such an action, was fully recognized and established, in the case of *Milford v. Godfrey*, 1 Pick. 91. That the owner of a pew, can not maintain such an action as this, was said by Buller, J., in the case of *Stocks v. Booth*, 1 T. R. 428; and also by Abbot, C. J., in the case of *Mainwaring v. Giles*, 5 Barn. & Ald. 356, although it might, in some cases, be maintained in Massachusetts, where their statutes declare pews to be real estate.

The plaintiffs, however, contend that they are the *cestui que*

use, and as such, are the owners, or occupiers of the house, and, that the court might direct the jury to presume a grant. The Religious Congregational Society, however, had not such a use, as would be executed by the statute of Henry VIII., and the possession transferred to the use, if, in any case, a corporation could be so seised of an estate in trust; nor could the court direct the jury to presume a grant, as the very object of the association of the Union Society, was, to secure to the several pew-owners their right and interest therein, and which would be defeated, if such a grant could be either made or presumed. Neither did the dedication of the house make any alteration, either in the ownership or possession, or change any of the rights before existing therein. It recognized the right of the plaintiffs therein, but did not give them such an occupancy, or *possessio pedis*, as is always required and implied in the occupancy of real estate, to enable the possessor to maintain an action of trespass. From the views already expressed, it appears that some of the requests of the defendants, to the county court, to charge the jury, should have been answered in their favor; and the direction should have been that the plaintiffs could not maintained this action.

The judgment of the county court is reversed.

PETERS v. FARNSWORTH.

[15 VERMONT, 155.]

AGENT TO SELL REAL ESTATE MAY BIND HIS PRINCIPAL BY COVENANTS OF WARRANTY in his deed, where his authority is to "sell for the best price, either by public auction or by private contract, etc., and to sign, seal, and execute all or any such contracts, agreements, conveyances, and assurances, and to do and perform all such acts or things for perfecting such sales as shall be requisite and necessary in that behalf." It seems that the authority to bind the principal by sealed contract is co-extensive with the power to bind by covenant of warranty.

CASE. Defendant, acting as attorney in fact for Cadwallader and Astley, conveyed to plaintiff a certain lot of land, with covenants of warranty and seisin. Subsequently, plaintiff was evicted from the land by title paramount. He now brought an action on the case, alleging in his declaration that defendant had falsely represented himself possessed of authority to bind Cadwallader and Astley by deed with covenants of warranty, and thereby deceived and misled him. Defendant introduced in evidence, after plaintiff had rested, the power of attorney

under which he acted. The operative clause will be found set forth at length in the opinion. The court below was of opinion that this power was insufficient to authorize the execution of a deed with covenants of warranty, and so instructed the jury. Plaintiff had a verdict.

H. R. and J. J. Beardsley, for the defendants.

Smalley and Adams, contra.

By Court, WILLIAMS, C. J. Exceptions were taken to the decision of the county court, by both plaintiff and defendant. The exception taken by the plaintiff is, to the rule of damages laid down by the court. Those taken by the defendant involve the inquiry, whether the plaintiff can maintain any action against the defendant, on the facts appearing in the case; and this depends on the construction to be given to the letter of attorney from Cadwallader and Astley to the defendant, for if that letter of attorney authorized him to execute the conveyance to the plaintiff, with the covenant of warranty, the suit of the plaintiff fails.

In certain sales of personal property, the agent who is empowered to sell, is authorized to give a warranty of the soundness of the article sold, on the ground, as was said by Lord Ellenborough, *Alexander v. Gibson*, 2 Camp. 555, that, as it is now usual, on the sale of horses, to require a warranty, the agent may be fairly presumed to be acting within the scope of his authority. Were we without the authority of any adjudged case on the subject, I should strongly incline to the opinion, that, inasmuch as it is usual, and customary, to insert covenants in most deeds of conveyance, more or less restricted, as the interest of the grantor may require, a letter of attorney, authorizing any one to sell, and to execute deeds or assurances, would authorize the inserting in the deed or assurance any such reasonable covenants as are usual in such deeds, limited only by the discretion of the attorney. And it appears to me that such a principle was recognized in the case of *Wilson v. Troup*, 2 Cow. 195 [14 Am. Dec. 458], where it was holden, that, under a power to mortgage, the agent was authorized to insert a power to sell, on default of payment. It is true, it was holden, in the case of *Coles v. Kinder*, Cro. Jac. 571, that on a promise to make reasonable assurance of land, the defendant was not bound to execute a conveyance, with ordinary and reasonable covenants; but in the case of *Laffels v. Catterton*, reported in 1 Mod. 67, and in Raym. 190, it was said by Twisden that the law is altered, since

the Coles and Kinder case, as to covenants in a conveyance, if they be reasonable. It appears to me it would but be extending the principle of the latter case to the present, to say, that, under a promise, or under a power of attorney to sell and deed, a deed with a covenant to secure the title, such as is usual, should be required. The court of appeals in Kentucky have decided that a power to sell lands includes an authority to convey with covenants of general warranty: *Vanada v. Hopkins*, 1 J. J. Marsh. 293 [19 Am. Dec. 92]. The case of *Nixon v. Hyserott*, 5 Johns. 58, is, however, opposed to this view; and the authority of the latter case is recognized both in 7 and 12 Johns. and 2 Cowen. Upon this subject it is very desirable that the law should be considered the same in the different states. In the case of *Nixon v. Hyserott* it is to be observed, that the letter of attorney authorized the attorney "to grant, bargain, sell, release, convey, and confirm in fee" to any person, certain specified lots, and that these are the operative words made use of in the granting part of a deed, and had no reference to the species of conveyance which the attorney might adopt. The further words, "to execute," etc., "such conveyances, assurances," etc., neither enlarged, extended, nor limited the authority first given, but only left it to the attorney to adopt such conveyance as, in his judgment, might be needful to transfer the title. The letter of attorney gave no other authority, except to sell, and execute such deeds as the attorney might think necessary to effectuate the sale. It was so treated in the cases of *Gibson v. Colt et al.*, 7 Johns. 390, and *Van Eps v. Schenectady*, 12 Id. 436 [7 Am. Dec. 830], where the case was mentioned.

In the case before us, the letter of attorney to the defendant authorized him to do all that was necessary in relation to certain tracts of land in Bakersfield and Fairfax to obtain possession, and to "sell for the best prices, either by public auction or private contract, as he might think most advantageous. And upon sale thereof, or any part thereof, and on receipt of the money, arising from such sale or sales, to give sufficient releases, acquittances, and discharges for the same, and to sign, seal, and execute, all or any such contracts, agreements, conveyances, and assurances, and to do and perform all such acts and things for perfecting such sale or sales thereof, or any part thereof, as shall be requisite and necessary in that behalf." Under this letter of attorney he was bound to make such contracts, as would be most advantageous to his principals, and to obtain the best prices, and was authorized to make such contracts or agree-

ments—which, if under seal, would be covenants—as were requisite; and could bind his principals thereby. He could bind them to make a good title by warranty deed, or otherwise. The authority was plenary to bind the principals by a contract, covenant, or agreement, to secure the title to the purchaser, and he could execute a deed, conveyance, or assurance, with such covenants as were necessary to procure the best prices and the most advantageous terms of sale. We think, therefore, that, under this letter of attorney, he was fully authorized to execute the deed to the plaintiff with the covenants therein contained, and by such covenants Cadwallader and Astley were obligated to assure the title, and the defendant did not exceed his authority and was not liable in this action.

The judgment of the county court is reversed.

BROWN v. WADSWORTH ET AL.

[15 VERMONT, 170.]

ADJUDICATION OF COURT MARTIAL or of any other tribunal of special jurisdiction, can not be avoided in a collateral action, for irregularity in the proceedings, where the court had jurisdiction both of the subject-matter and of the person.

TRESPASS. Plea in bar, that prior to the bringing of this action, plaintiff being a member of a militia company, after being duly warned, failed to attend at a meeting of the company, wherefore he was amerced a fine, and was summoned to show cause upon a day certain before a court martial of his regiment, why judgment should not be rendered against him for the amount of the fine; that the said summons was served on plaintiff by reading the same to him. That afterwards, upon the day mentioned in the summons, judgment was recovered against plaintiff in said court martial for the amount of his fine. That defendant Wadsworth, in his capacity of field officer of the regiment, issued execution on the judgment, and delivered it to the other defendant, who levied the same upon a cow belonging to plaintiff, wherein consisted the supposed trespass mentioned in the declaration. Plaintiff replied that he had not been served prior to the trial with copies of the charges and specifications upon which he was tried. Defendants rejoined that the plaintiff was present at the court martial in person and by attorney, and that the matters set forth in his replication were matters in defense, which should have been relied upon then. Plaintiff demurred to the rejoinder;

but the pleading was sustained by the court below, which gave judgment for defendants.

H. Adams, for the plaintiff.

W. W. White, *contra*.

By Court, REDFIELD, J. The only question to be determined in this case is, whether the proceedings of the court martial can be avoided, for the insufficiency of the notice to the plaintiff. In regard to these summary and special jurisdictions, it has long been settled, that any matter, which goes to show a want of jurisdiction, either of the subject-matter adjudicated, or of the person of the alleged delinquent, may be shown, to avoid the effect of their judgments. But where they have, as in the present case, jurisdiction, both of the subject-matter, and of the person of the party, the effect of their adjudication can not be avoided, by any circumstantial irregularity in the detail of the proceedings, either before or at the time of trial. As Lord Ellenborough said, in the case of *Turleton v. Turleton*, 4 Mau. & Sel. 21, in regard to a foreign judgment, "The trial in this action is not in the nature of a writ of error upon the proceedings" in the court martial. Their jurisdiction being fully shown, the plaintiff is bound by the amercement: *Darling v. Bowen*, 10 Vt. 148. Case in Washington county, July term, 1839, not yet reported.

Judgment affirmed.

ADJUDICATION OF A COURT in a matter over which it has acquired jurisdiction can not be avoided in a collateral proceeding for irregularity. There is no distinction in this respect between courts of general and courts of inferior jurisdiction: See *Bloom v. Burdick*, 37 Am. Dec. 309, note; *Atkins v. Kinman*, 32 Id. 534, and note, and cases cited.

WAINWRIGHT v. STRAW.

[15 VERMONT, 215.]

AGREEMENT TO PAY IN KIND, IF NOT DISCHARGED AT THE MATURITY OF THE OBLIGATION by a delivery of the goods, may be treated by the obligee as an agreement to pay in cash, and he may maintain a general action of *assumpsit* thereon.

STATUTE OF FRAUDS—UPON A JOINT SALE TO TWO, BOTH VENDERS ARE PRINCIPALS, though the article sold might have been intended by them for the individual use of one; and therefore the undertaking of the other is not required by the statute of frauds to be in writing.

NOTE IN WHICH WORDS INDICATIVE OF THE TIME OF PAYMENT ARE OMITTED, as is the case where the note is payable "one after date," is void for

uncertainty, and can not be aided by parol evidence as to the time of payment intended.

AGENT OR SERVANT MAY BE A WITNESS for his principal.

ASSUMPSIT. The declaration contained three counts, the first two upon the note executed by defendants to plaintiffs and described in the opinion, and the last a count for goods sold and delivered. The court below was of the opinion that the note was void, and therefore disregarded the counts based upon it. Upon the other count, the court before whom the trial was had without a jury, rendered judgment for plaintiffs. The deposition of Brown, the agent of plaintiffs, who sold to defendants the stove, for the recovery of the price of which this action is brought, was introduced on the trial to show the circumstances under which the sale was made, and was admitted over the objections of defendants. The other facts appear from the opinion.

E. D. Barber, for the defendants.

O. Seymour, *contra*.

By Court, BENNETT, J. This is an action of *assumpsit*, upon a special promise, and the declaration also has a general count. The recovery was upon the general count. The case has been defended with zeal and ability, and all has been made out of the defense, which the case was susceptible of, but the court are not convinced that there was error in the proceedings of the county court. The deposition of Brown states, in substance, that both the defendants applied to him to buy a stove for Straw's use, and that the witness, as the agent of the plaintiffs, sold them one upon their joint responsibility, at a given sum, payable in cattle at a given day, and if not paid in cattle, to be paid in grain in a given period thereafter. It is insisted, in argument, that the general action can not be sustained, inasmuch as there was a special contract for the stove, payable either in cattle or in grain. It is to be remarked that the time of credit had expired before the suit was brought; and in *Way v. Wakefield*, 7 Vt. 223, it was held that the general action would well lie for a harness, sold at a given price, payable in boards, after there had been a breach of the contract. This case is, I think, according to the current of English authorities; and must be regarded as settling the law in this state. In the present case, the price of the stove agreed upon was so many dollars, and not for a given quantity of grain. The debt had not been paid in the property at the time agreed upon, and it had become absolutely a cash demand. After this, there seems to be no reason why the general action

will not lie, as well as it would if the debt had been originally payable in money.

It is also objected that the contract, so far as Cunningham is concerned, is within the statute of frauds. To bring a case within the statute of frauds, it is necessary that the undertaking should be collateral to, and in aid of, the promise of another. But in the present instance, the promise of the defendants is joint. They both made the purchase, and upon their joint responsibility. It is, also, said that the general action will not lie against Cunningham, as he stands but a surety for Straw. If such was the relation of the parties, there would be weight in the objection. But such is not the case. To create this relation the sale should have been made to Straw alone. The fact that it might have been for the individual use of Straw, is not sufficient to create the relation of principal and surety. It is said that the note, given by the defendants, upon the sale of the property, precludes the general action. The note, if it may be called such, is payable to J. & — Wainwright, with cattle in one — from the first of October next, or “merchble” grain by the first of January following. The uncertainty, appearing upon the face of this note, is such as to render it void. We can not, by intendment, supply the name of Rufus, nor the word year after the word one. We might as well intend it payable in one month, as one year. The case falls within the principle of the case of *Brown v. Bebee*, 1 D. Chip. 227 [6 Am. Dec. 728], in which it was held that a note, by which the defendant promised to pay the plaintiff sixteen — by the first day of May, then next, was a nullity. In such case, parol evidence can not be received to give effect to the intention of the parties. Besides, it is a principle of the common law, that one simple contract is not a merger of another; and it is held in New York, and this is probably the English law, that a negotiable note is not a merger of the original cause of action, so as to preclude a right of recovery thereon, if the note is brought into court to be surrendered up.

It might seem that the case of *Hutchins v. Olcutt*, 4 Vt. 549 [24 Am. Dec. 634], somewhat extended the doctrine of merger, but I am not aware of a case in which we have extended it to a note not negotiable. In the case before us, there was no evidence of any agreement, that the note should be received in satisfaction of the stove. No such fact is found by the county court. Brown was clearly a competent witness, and his deposition properly admitted. It is a well-settled principle, founded

upon public convenience and necessity, that a mere agent or servant is a witness for his principal: Greenl. Ev. 459. In this light the deponent stood to the plaintiffs.

The judgment of the county court is affirmed.

In *Conner v. Routh*, 7 How. (Miss.) 176; S. C., *ante*, 59, a note similar to that sued upon in the principal case was before the court; that is, one in which words expressive of the time of payment were omitted; and it was held that the note was not void for uncertainty, but the words omitted might be inserted, and the note declared upon as it would have been had it been drawn out according to the intention of the parties.

FOOT v. KETCHUM. KETCHUM v. FOOT.

[15 VERMONT, 258.]

IN EQUITY, WHERE DEMANDS ARE IN REALITY MUTUAL, THEY MAY BE SET OFF, though they are not nominally mutual. Thus where a note executed to a firm, has become the separate property of one of the partners, a demand due to its maker by this partner, may be set off against the judgment obtained by him on the note in the firm name.

ASSIGNEE OF A CHOSE IN ACTION takes subject to all the equities existing in the original debtor.

ASSIGNMENT OF A NEGOTIABLE INSTRUMENT AFTER IT IS PAST DUE is of no greater effect than the assignment of any other chose in action, and the assignee is subjected to the same set-offs as was his assignor.

PROMISE BY DEBTOR TO PAY AN ASSIGNEE does not create an estoppel where it is made posterior to the assignment.

BILL in equity. The case is stated in the opinion.

C. Linsley, for Ketchum & Shaw and Allen Ketchum.

H. Seymour and P. Starr, for Harriett S. Foot.

By Court, BENNETT, J. This case has come before us by an appeal from a decree of the chancellor of the third judicial circuit, and we are called upon to revise his proceedings. In February, 1836, the oratrix was indebted to Ketchum & Shaw, in about the sum of four hundred dollars, and gave them her note, payable to their order on demand. The note has been prosecuted to final judgment, and the object of this bill is to procure a set-off of a claim which the oratrix has against Joseph C. Ketchum, in payment of the judgment on the note. The first question which presents itself, is, whether the oratrix is entitled to the prayer of her bill, as against Ketchum & Shaw. We think it is well established by the testimony, that when the note was given, it was understood by the parties that it should become the private property of Joseph C. Ketchum. The testi-

mony of Charles K. Foot is full that such was the previous understanding between the oratrix and Mr. Shaw, and that it was expected that her claims against Joseph C. Ketchum would be applied on the note. The evidence is very ample that the note did, in fact, become the private property of Ketchum; and no question is made upon the evidence as to his insolvency; and, indeed, none can be made; and the note remained in the possession of Ketchum, up to the time he absconded, in November, 1837. Though the rule in chancery, as well as at law, to authorize a set-off requires the debts to be between the same parties, yet, if the demands are, in reality, mutual, though not nominally so, and equity requires a set-off to be made, chancery will make it. It was so done in the case of *Ferris v. Burton*, 1 Vt. 439. This is according to the usual course of chancery proceeding; and it is too clear to admit of debate, that as between the parties to the original bill, this is a proper case for a set-off.

But the important question arises on the cross-bill of Allen Ketchum, who claims to come in as the assignee of Joseph C. Ketchum. Has he an equal, or a superior equity to the oratrix, which will enable him to defeat the set-off? There seems, from the testimony, to be some uncertainty as to the manner, the object, and conditions, upon which the note of Mrs. Foot went into the possession of Allen Ketchum. It was not included with the other demands in the written assignment of Joseph C. Ketchum. It is not indorsed; neither is its transfer evidenced by any note or memorandum in writing. If Joseph C. Ketchum, as it is claimed, on the eve of his leaving the state, passed the note over to Mr. Drury for the benefit of the orator in the cross-bill, yet it was to indemnify him against liabilities which he had previously incurred, and not upon any new consideration advanced at the time. It was long after the note had ceased to be current, and in violation of all good faith between Joseph C. Ketchum and his mother-in-law, Mrs. Foot. No legal title to this note passed to Allen Ketchum, but, at most, only an equitable one; and, standing upon his equity, he can not be in a better condition than Joseph C. Ketchum himself, and no new equity is created by force of the assignment.

It is a well-settled doctrine that the assignee of a chose in action takes it, subject to all the equity existing at the time, in the original obligor or debtor: *Turton v. Benson*, 1 P. Wms. 496; *Coles v. Jones*, 2 Vern. 692; *Murry v. Lyburn*, 2 Johns. Ch. 442; *Norton v. Rose*, 2 Wash. 233, 254. Though the note was negotiable, yet, as it was not negotiated, and passed after it ceased

to be current, the law merchant, as applicable to commercial paper, can not aid the orator in the cross-bill. All the claims of Mrs. Foot against Joseph C. Ketchum accrued before he parted with the note. When she consented to give the note, running to Ketchum & Shaw, she was assured the note was to become the private property of Ketchum; that any claims which she might have against Ketchum might be brought in in payment of it; and, after the settlement between Ketchum & Shaw, by which this note became the property of the former, and while he was renting the store of Mrs. Foot, and was the owner and holder of this note, there was an express agreement between them, that her claims should be set off on the note, and that the balance, if any, should be paid out of the sale of her house, which Ketchum, at that time, contemplated buying. But the house was not sold; and Ketchum rented the same up to the time he left the country. In addition to this, Ketchum is insolvent. Here, then, we think there is an equity in Mrs. Foot to have the set-off made, superior to any which attaches to Allen Ketchum, and of which she ought not to be defeated by force of the assignment.

It has been said, in argument, that while the note was in the hands of Allen Ketchum, Mrs. Foot promised to pay it; and that she has thus precluded herself from the set-off. But from all the testimony in the case, and the circumstances attending the transaction, the fact of such promise being understandingly made rests in doubt. If such promise was made, it most probably had relation to the payment of such balance as, in the end, might be found due. It is evident that Mrs. Foot was not in a situation to liquidate her claims against Joseph C. Ketchum, at any of the interviews between her and Mr. Drury; and, it is quite probable, was not advised as to what the precise standing of their relative claims in justice should be. But if there had been an absolute promise to pay the note, still it would not operate as an estoppel to this claim for the set-off. It was without consideration, made after Allen Ketchum had taken the note, and while J. C. Ketchum was insolvent, and out of the country, and was, in no way, made a ground of action by Allen Ketchum. If he had been induced to act upon it to his prejudice, it might have merited a different consideration. Such evidence, when investigating the standing and amount of her account, could be urged with propriety upon the consideration of the triers; and probably it might have been, in this very matter, before the auditors.

Before a set-off can be made, it is necessary that the account should have been liquidated by a master, or by some other means. In the present case, Allen Ketchum, claiming to be the assignee of the note, commenced his action on the note, and, as matter of defense, Mrs. Foot filed her declaration on book against Joseph C. Ketchum, in offset. The counsel for Allen Ketchum, who appear upon the record for Ketchum & Shaw, appeared, and submitted, in the declaration on book, to a judgment to account, and the matter went to auditors. The counsel for Allen Ketchum appeared before the auditors with the private account of Joseph C. Ketchum; and there was a full, and, for aught that appears, an impartial trial; and the allegation that the account allowed by the auditors was unjust and fraudulent is without evidence to support it. All the evidence relative to the accounts now before us was, or might have been, before the auditors. Mr. Drury might as well have been examined as a witness then as now, and, for aught that appears, was examined. The auditors were competent men, whose impartiality and integrity is not to be questioned. The claims of Mrs. Foot were defended against by the same counsel who now appear to contest them, and who then had the same means of knowledge relative to them, which they now have.

In regard to the account of Mrs. Foot, which accrued before the settlement of Ketchum & Shaw's account by the giving of the note, and about which much has been said, the auditors find it was not included in that settlement. The settlement was made by Shaw, and it is quite reasonable to suppose that he might not settle the private accounts of his partner. The auditors allowed to Mrs. Foot, for washing, over two years, for lamps, wood, making fires, and for watching and nursing, one hundred and fifty-six dollars. Though this might seem to be a large sum, yet, whether reasonable or not, must depend upon the circumstances of the case. The physicians who attended Mr. Ketchum in his sickness, and who testified before the auditors, and whose testimony was taken in the chancery court, did not think it an unreasonable sum. They probably have as good a knowledge about it as any one. The report of the auditors, when returned to the county court, was accepted without objection. The auditors did, no doubt, what they thought right, though their proceedings are now strongly called in question; but if we are not to consider the proceedings upon the declaration on book as conclusive—as *res adjudicata*—but that it is within the power of the court to open the account to further

litigation before a master, still there would be no good reason to suppose that better justice would be done by the master, in this respect, than has been already done by the auditors. Indeed, considering there has been the lapse of about five years, since the accounts have been adjusted by the auditors, there is the less probability of a just result. On the whole, though it is possible injustice has been done, the court see no good reason for sending these accounts to a master; and we are disposed to adopt the liquidation by the auditors. Nothing should be allowed to Mrs. Foot on the Perry note; but she is entitled to have allowed her the small amount collected of Dunning. The amount, and the time of its receipt, are given in the testimony of Mr. Barber. This, added to the amount reported by the auditors, with the interest, exceeds the amount due on the note in controversy. The set-off was properly made by the chancellor; and as Allen Ketchum has resisted it against equity, he should pay costs upon his cross-bill.

The decree of the chancellor should be affirmed, with additional costs, and the cause is remitted to the court of chancery, to be proceeded with accordingly.

CLEVELAND v. WOODWARD.

[15 VERMONT, 302.]

ONE PARTNER CAN NOT PLEAD THE NON-JOINDER OF A COPARTNER in abatement, where the contract upon which the action is brought was entered into by plaintiff with him alone, and without knowledge that it had reference to a partnership transaction.

ACTION upon a book account. The opinion sufficiently states the case.

S. H. and E. F. Hodges, for the plaintiff.

By Court, WILLIAMS, C. J. This case seems to be conclusively settled by authority. The plaintiff had dealings with the defendant. The only dispute is in relation to the four last items in the plaintiff's account, which were for labor performed on a farm, of which the defendant and Stillman Woodward were owners, and which they carried on in company. The defendant contracted with the plaintiff for the labor, who did not know of the existence of the company until after the commencement of this suit. If these items are disallowed, the balance would be due to the defendant. It is to be remembered that it is only in this

action that advantage can be taken of the non-joinder of a joint debtor, on trial of the merits. It is settled that a plaintiff can not be compelled to be a creditor of two, one of whom he did not know, as his joint debtors, and not be the sole creditor of the one he does know. In the case of *Dubois v. Ludert*, 5 Taunt. 609, it was decided that if a man enters into a contract with one person, not knowing he has a partner, it is competent for that partner, being sued, to plead, in abatement, that he has other partners who are not joined. That case, however, stands alone, and is opposed to the decision in the case of *Baldney v. Ritchie*, 1 Stark. N. P. Cas. 338; *Doe v. Chippenden*, there cited; to the opinion of Lord Eldon in *Ex parte Norfolk*, 19 Ves. 455, and directly overruled by Lord Tenterden, in *Mullett v. Hook*, Moo. & M. 88, and by the court of king's bench, in the case of *De Mautort v. Saunders*, 1 Barn. & Adol. 398. By these cases, it is fully settled that, even in the case of a general partnership, if a contract is made with one of two partners alone, and the plaintiff is not aware that he is dealing with the partnership, and it is not disclosed to him by the defendant with whom he deals, the non-joinder can not be pleaded in abatement. *A fortiori*, it can not be done in the action on book, where a failure to recover might endanger all the security he may have by attachment for his debt.

The judgment of the county court is, therefore, affirmed.

HUNT v. THURMAN.

[15 VERMONT, 336.]

UNDER A CONTRACT TO DELIVER WOOD TO A LARGE AMOUNT before a day certain, the delivery need not be of the entire amount at the same time, but may be of portions upon several days, and the delivery of each portion vests title in the vendee, and subjects him to the risk of future loss of the property.

PLACE OF DELIVERY MENTIONED IN A WRITTEN CONTRACT OF SALE may be changed by subsequent parol agreement.

DELIVERY BY A VENDOR IS SUFFICIENT where all has been done by him that he may do, though something remains to be accomplished by the vendee. Thus the delivery of wood sold by the cord may be sufficient, though it has not been measured by the vendee.

ACTION on book account. From the report of the auditors appointed to take the account, it appeared that plaintiff and defendants had in 1839 entered into a written agreement whereby plaintiff agreed to deliver before July 1, 1840, on Gibbs & Byram's dock, from three hundred to one thousand cords of

wood of a certain quality at two dollars a cord, and defendants agreed to take the wood at that price. Defendants afterwards discovered that the steamboats to which they intended selling the wood did not stop at Gibbs' dock, and therefore requested plaintiff not to deliver the wood there. The wood, to the amount in all of seven hundred and sixty-two and one half cords, was piled by plaintiff on the lake shore south of Gibbs' dock, and there was evidence that this place was agreed to by defendants as a place of delivery. After the wood had been piled up, plaintiff often requested defendants to measure the same, but they neglected to do this, until the third day of July, 1840, when they caused it to be measured by Captain Boardman. Before this, owing to an unusually high rise in the waters of the lake, part of the wood on the shore was washed away. Plaintiff claimed that he was entitled to compensation under the contract for this wood, and this was the matter at issue between the parties. Upon the report of the auditors the court below rendered judgment in favor of plaintiff.

R. R. Thrall and J. Collamer, for the defendants.

E. N. Briggs, for the plaintiff.

By Court, **HEBARD, J.** From the contract, under which the wood in question was delivered, it appears that the quantity to be delivered, except as limited by a minimum and maximum, is not expressed; that the time of delivery, is all the time between the date of the contract and the first day of July after—and the place of delivery, on Gibbs & Byram's dock; and the kind and quality of the wood is expressed in the same general terms. The question is, whether there was such a delivery of the wood that was carried off by the flood, as to vest the property in the defendants, and entitle the plaintiff to recover the pay for it? If the plaintiff has done everything agreeably to the terms of the contract, there can be no doubt of this, unless the parties have, in some way, varied or enlarged the contract, subsequent to its inception; and this is not shown to have been done, so far as the simple fact of a delivery is concerned. It appears from the auditor's report, that the place of delivery was varied, by mutual consent of the parties, as to a part of the wood. This is different from a contract to deliver a certain specified amount, or value, of specific articles, in payment of an antecedent debt. In that case, the whole amount due must be delivered on the furthest day named. In this case, two things are to be noticed; first, the quantity of wood is such as to render it impossible

that the whole should be delivered in one day; the other is, that the phraseology of the contract is such as to imply that it was to be delivered on different days—and the ultimate quantity was not specified—only the largest and smallest quantities. The expression in the contract is not, on or before a certain day, nor on a certain day—but it is to be delivered before the first day of July. Whatever wood was delivered agreeably to the contract became the property of the defendants; and the plaintiff had no right, afterwards, to take it away. The defendants, to some degree, assented to what was done. One of them was present when some of the wood was delivered, and assented to the place of depositing it.

The case of *Zagury v. Furnell et al.*, 2 Camp. 240, is cited by defendants to sustain their objection, for want of a delivery. The governing principles in the two cases are not similar. The question of delivery is a question of fact, and must, of necessity, be governed, in a great measure, by the nature of the transaction, and the nature and circumstances of the property to be delivered. This wood, by the written contract, was to be delivered on Gibbs & Byram's dock; but the parties, afterwards, varied this part of the contract, by parol. In other respects, it is evident they intended to be governed by the written contract; and the auditors have found the fact, that the wood was delivered according to that contract. In the case of the goat skins, in the case referred to, there was no delivery, and nothing that the parties talked about as a delivery. They talked about a sale of the skins; but the case finds that the usage of trade was to count them over, and the duty of the seller to do so, to see whether the bales contained the number specified in the contract; and before any of the skins had been counted, the whole were destroyed by fire, at the wharf where they lay, at the time of the sale. The buyer had never received them. They had not been moved after the sale, and were not placed where they were, by any consent or agreement of the buyer; nor was the place of delivery any part of the contract of sale. In all these particulars, it varies from the present case. The wood had been delivered at the stipulated place, within the time agreed upon, subject to the defendants' convenience; and would have been measured but for the neglect of the defendants.

The plaintiff applied to the defendants to measure the wood, and they told him that Boardman would measure it; and he called upon Boardman a number of times, but he neglected to do it, till after the wood was carried off. We, therefore, think

that the plaintiff had done all that he could do, and all he was bound to do, to fulfill his contract.

The judgment of the county court is affirmed.

COGGSWELL v. BALDWIN.

[18 VERMONT, 404.]

PLAINTIFF MUST DECLARE UPON THE CAUSE OF ACTION STATED IN HIS ORIGINAL WRIT; but if the facts set forth in the writ show the action to be improperly entitled therein, as if it be styled an action of trespass, whereas it should be an action on the case, he may amend in his declaration by inserting the proper name.

IT IS THE DUTY OF THE OWNER OF A VICIOUS COW, who has knowledge of the propensity of the animal, to restrain it, and he is, in case of failure, liable for the damage it does.

CASE. This action was begun before a justice of the peace. The original writ described the action as one of trespass, and contained a statement of the cause of action, to the effect that defendant was possessed of a vicious cow, and that with knowledge of its vicious propensity he had allowed it to go at large, and that while at large it had hooked a horse belonging to plaintiff, which had died from the hooking. Upon the removal of the case to the county court, the plaintiff obtained leave to file an amended declaration, in which the action was described as one of trespass on the case. Upon the trial it appeared that the cow had hooked the horse while on the highway going to the watering-place for defendant's cattle, and that the highway at the place where the accident occurred was on the land of the defendant. It appeared also, that the horse at the time of the accident had escaped from plaintiff, who had undertaken to drive him along the highway without halter, and had got amongst the cows of defendant, who were then being driven, as before said, along the highway to their watering-place. Defendant requested instructions that this case showed negligence on the part of plaintiff sufficient to excuse him, and that moreover the defendant was not liable, even though the viciousness of the cow was known to him, because the hooking took place while the cow was on the highway, on her way to a watering-place, and on the land of defendant. These instructions were refused, and defendant excepted. The other facts appear in the opinion. Plaintiff had verdict.

D. Roberts, jun., for the defendant.

H. Canfield, contra.

By Court, **HEARD, J.** By our statute, the plaintiff, at the time he sues out his writ, is required, also, to make out his declaration of his claim, which goes along with the writ; and this, of course, must determine the nature of the action. If it were usual or allowable for the plaintiff to call the defendant into court, by merely stating the name of the action, without making any statement or specification of his claim, there would be more propriety in regarding the name, alone, as of some importance. The reason for having the cause of action declared and set out, is, to give the defendant notice of what is to be preferred against him; and, that being done, there is no principle of law better settled than that he can not afterwards change the form of action. The authorities are full on this subject. But the action, and consequently the form of it, depends much more upon the matter alleged and set forth as the ground of the claim, than upon the mere name that happens to be given to it.

In *Carpenter v. Gookin*, 2 Vt. 495 [21 Am. Dec. 566], the court say that "as a description of the matter of demand, or cause of action, so far as to specify the general nature of the action, is all that is usual, or necessary in a suit before a justice of the peace, the plaintiff is at liberty, when the cause comes by appeal to the county court, to file a declaration in proper form, upon the particular cause of action, described or specified in the writ." In this case, and in a number of other subsequent cases, in this state, the "nature of the action," and the "cause of the action," and the "form of the action," are indiscriminately spoken of when discussing this question; but in no case, I believe, is anything said about the name of the action. Swift in his digest, p. 639, uses similar language. He says, the plaintiff may amend, "provided he does not change the form or ground of action." Cowen's treatise, 333, is full on this point. It is there laid down that "the cause of action, stated at length, shall be deemed the true one," and not the name by which it is called. In this case, the plaintiff, in his original declaration before the justice, commenced his declaration by stating, "in a plea of trespass," and then proceeded to state the ground of his complaint, in such a way as did not admit of its being trespass—in other words, he so stated it as to make it trespass on the case. No act is alleged against the defendant, only a neglect or an omission to do that, which, if it had been done, the plaintiff would not have sustained the injury. The new declaration which he filed in the county court, counted upon the same facts as the original declaration, and recited the same transaction, and nearly in the

same words, in the most important parts. It could not, then, be changing the cause of action, or the form of action. This disposes of all there is objectionable in the declaration.

The next objection is to the charge of the court. On the trial in the county court, the defendant requested the court to give the jury certain instructions in relation to certain negligences of the plaintiff, on account of which he was not entitled to recover; and upon this request to charge the jury, and refusal to charge as requested, the defendant excepts, and not from the general charge of the court, in relation to the plaintiff's right to recover, nor from a charge given at the request of the plaintiff. This is important to be noticed in considering the case. If the court had been requested to charge the jury in relation to the extent and nature of the evil propensity of the cow, and the extent of the defendant's knowledge of that propensity, we might suppose that all that is detailed in the bill of exceptions is all that was said upon that part of the case. From what comes to us in the bill of exceptions, it will be seen that the defendant was raising no question in relation to the evil propensity of the cow, nor of defendant's knowledge of that propensity, but it was, in the first place, that defendant was not liable on account of the place in which the injury was sustained, and, in the next place, that the injury happened through the negligence of the plaintiff, and that the defendant, therefore, was not liable. But we think the defendant was not entitled to such a charge, upon either of these points. If the cow had this vicious habit, and this was known to defendant, it was her duty to have restrained the cow—and, in regard to the question of negligence on the part of the plaintiff, that must depend upon the attendant facts and circumstances, and was properly submitted to the jury. It will be noticed, that so much of the charge as is set forth in the bill of exceptions, is in relation to the request of the defendant, relative to those points already stated, but does not pretend to be a statement of the charge of the court, in relation to what was necessary to have been proved by the plaintiff in relation to the mischievous propensity of the cow, nor of the defendant's knowledge—and what the charge of the court was, in relation to that part of the case, does not appear, excepting what is incidentally stated in the other part of the charge—and we perhaps would be justified in presuming that the charge in that respect was unobjectionable, or the defendant would have excepted to it at the time.

The case finds that the cow, on one occasion, had hooked a.

horse, and that was known to the defendant, and she caused buttons to be put upon her horns, as a preventive. Only one act of hooking, before the one complained of, was proved. Still, others might have existed—and how far the circumstances tended to prove it, or would authorize a jury to arrive at that conclusion, is not for this court to say. It is enough to say that they might have that tendency. But, taking the charge of the court upon the mischievous propensity of the cow, as it has come to us, we discover nothing erroneous in it, although it might have been more full. It is evident the court did not intend to rest it upon a single act of hooking, for, when speaking of hooking horses, the court used the expression in the plural number, and did not confine it to a single instance.

Upon the whole, we are satisfied with that part of the charge to which the defendant excepted; and in relation to the other, if we are at liberty to revise it, without its being excepted to, we are not convinced, from what appears in the case, that there was any error.

Judgment affirmed.

THE OWNER OF A FEROCIOUS DOG, WHO, WITH A KNOWLEDGE OF ITS DISPOSITION keeps it negligently, whereby it is enabled to do injury, is liable therefor: *Pickering v. Orange*, 32 Am. Dec. 35; *Loomis v. Terry*, 31 Id. 306, and note.

PETTES v. MARSH.

[15 VERMONT, 454.]

OWNER OF GOODS WHO RECEIPTS FOR THE SAME AS ATTACHED is liable in trover to the officer, if he refuses to deliver them to the latter upon demand, although no actual seizure of the goods, under the writ of attachment, preceded the receipt, where the goods were at that time in the possession of the receiptor.

TROVER. The opinion states the case.

Charles Marsh, for the defendant.

O. P. Chandler, contra.

By Court, ROYCE, J. The sole question is, whether the action of trover can be sustained upon the facts appearing in this case. That trover will lie, in an ordinary case, in favor of an officer against the receiptor of goods attached, was fully decided by this court in *Sibley v. Story*, 8 Vt. 15. But it is urged, that, in this instance, there was no sufficient attachment of the sheep, to vest in the officer the requisite legal interest to support this

form of action. We are asked to treat the attachment, for the present purpose, as if no such property existed at the time of the alleged service of the writ—to regard it, in all respects, as a fictitious attachment. And whilst it is conceded that, in this view, it would be sufficient to uphold the contract of the receptors, it is insisted that it can not subject them in tort.

It is not my purpose to controvert the able argument which has been founded upon this view of the case. Did we consider that the transaction must necessarily be regarded in this light, I should be disposed to yield to the argument. But we think the attachment ought not to be considered fictitious. The case shows that this defendant actually owned, and had upon his farm, five hundred sheep; that the officer went there to make service of the writ; and that, without requiring the ceremony of going to view the sheep, or separating the flock, the defendant, and another person, executed a receipt for three hundred and fifty of the sheep, which the officer returned as being attached upon the writ. Now there is no doubt but that the legal requisites of a valid attachment are such as the counsel has contended for. It is nothing less than the actual seizure of property, or having it within the power and control of the officer. But this definition is framed with reference to an attachment, in the strict sense of a proceeding altogether *in invitum*—the power of the law operating against the will, or without the concurrence of the party affected by it. As against an unwilling party, or a third person, whose rights are affected, it must, doubtless, conform to this description.

It is competent, however, for a party to dispense with forms or ceremonies which he might have insisted on, and still leave the attachment effectual as against himself. He may consent to be treated as being under arrest, when the officer has not acquired the actual control of his person; and so he may consent that his goods shall be treated as being attached, when the officer has not actually seized them. In each case it is but submitting to the power of the law, without constraint. And if, under such circumstances, the officer returns the arrest, or attachment, with the party's assent, that return should be, as it legally is, conclusive evidence of the fact. And if the principle here advanced be a sound and just one, the present is surely a strong case in illustration of it. The property did exist and was attachable; and but for the voluntary arrangement between the defendant and the officer, it would have been regularly seized and removed. But the defendant chose to have it treated as being

attached (waiving the ceremony of actual seizure and removal), and undertook to keep it for the officer, who, with his assent, charged himself with a liability for it. He can not now say, that his subsequent possession of the property was not subservient to the officer's right. It appears that the property was afterwards duly demanded, but having been previously disposed of, was not restored. We think, that upon such a state of facts, the action of trover can be maintained.

Judgment of county court affirmed.

RECEIPTOR FOR ATTACHED GOODS, when estopped from contradicting receipt: *Dewey v. Field*, 38 Am. Dec. 376; *Lathrop v. Cook*, 31 Id. 62, and cases cited in notes.

POWERS v. SOUTHGATE ET UX.

[15 VERMONT, 471.]

WHERE THE PROMISES OF OBLIGORS ARE SEVERAL, NO ADMISSION OF promise by one can remove the bar of the statute of limitations as against the others.

IDEM—PROMISE OF THE HUSBAND TO PAY THE DEBT OF THE WIFE incurred before coverture, can not remove the bar of the statute of limitations against her.

ACTION upon book account. From the report of the auditor appointed to take the account, it appeared that to the action, which was for the recovery of an account for medical services rendered to the wife before marriage, the defendants pleaded the statute of limitations, and that plaintiff, to avoid the plea, introduced evidence of a promise by the husband that he would pay the debt. The court below gave judgment for defendants.

O. P. Chandler, for the plaintiff.

Tracy and Converse, contra.

By Court, BENNETT, J. The question presented for our consideration is, whether the declaration of Southgate to the agent of the plaintiff, that he would see the amount paid, removed the statute bar, which had then run upon the account. To enable the plaintiff to recover in this action, the bar must be removed, both as to husband and wife. In *Whitcomb v. Whiting*, Doug. 651, it was held, that the admission of one of two joint and several promisors, took the case out of the statute as to both. Though the soundness of this case has been frequently questioned, and is opposed to a case in Ventris, yet it has been followed by subsequent cases in England, and the same case has

been recognized, as good authority in this state, in the case of *Joslyn v. Smith*, 18 Vt. 353. It has been frequently said by judges, however, that it ought not to be extended. The principle upon which part payment, or other admission of one, is allowed to affect other parties jointly indebted with the person who makes the admission, is the community of interest between them, by reason of which the act of one, in legal contemplation, is the act of all. I am not aware that it has ever been attempted to extend this principle to a case where the promise or obligation was only several, and not either joint, or joint and several. Though the obligation may have been joint, yet, when the community of interest has once ceased, the principle ceases to have application. Hence, in the case of *Atkins v. Tredgold*, 9 Com. L. 20; S. C., 2 Barn. & Cress. 23, it was held, that after the death of one of two joint, or joint and several contractors, his executors can not be prejudiced or made liable, by a part payment by the survivor, after the lapse of six years.

If the promise of the husband, that he would see the debt paid, removes the statute bar, as against husband and wife, it must have the same effect, if the wife be sued alone for the debt upon the death of the husband. But the husband and wife are not joint contractors. The debt is not a joint debt against husband and wife; but remains, after marriage, the debt of the wife. The husband is not made chargeable for the debt of the wife during coverture, upon the principle that the marriage makes it his debt. If he dies first, the debt does not survive against his representatives, whether the husband, by the marriage, acquired a property with the wife or not. The reason assigned in the books why the husband, while living, should be a party to the suit with the wife is, that judgment may be against both, as the wife can not be imprisoned upon a civil process alone, without a violation of the marital rights. For myself, then, I think it is clear, that the husband's admission can not remove the bar as to the wife, upon the ground that they are joint promisors or debtors.

But it may be thought that the husband acts as the agent of the wife, and that, consequently, his admissions should bind the wife. But whence does he derive his authority? It is not, I think, one of the marital rights, flowing from the marriage. These are all well defined; and it has never been heard of, that among these is to be found the right in the husband, by his admissions, to remove a statute bar, which, otherwise, might avail the wife, not only during the husband's liability, but after that

may have ceased. While under coverture, the wife can make no promise which will be obligatory upon her; and much less can she appoint an agent to make one for her. In the case of *Axson v. Blakely*, 2 McCord, 5 [13 Am. Dec. 697], it was expressly adjudged that the promise of the wife, after marriage, to pay a debt contracted while sole, will not take the case out of the statute. So in *Pittam v. Foster et Ux.*, 8 Com. L. 106; S. C., 1 Barn. & Cress. 248. Foster, and the wife of Norris, while sole, had executed a joint note, and it was held that the admissions of Foster, after the intermarriage of Norris and his wife, would not take the case out of the statute as against Norris and his wife. The case proceeds upon the ground that a promise by the wife, made after marriage, could not be available; and consequently she can not be prejudiced by the admissions of her co-contractor. To take a case out of the statute, there must be an admission of the debt, accompanied with a willingness to pay it, or at least, not with an unwillingness. As an individual member of this court, I think that Southgate had no authority, either as derived from a community of interest, as in the case of joint contractors, or from the marriage tie, or from any authority subsequently, by implication, derived from the wife, to make any admissions which should defeat the wife of the benefit of the statute, if sued after the death of her husband, or the husband and wife when both are sued for her debt, as is now the case. These grounds are sufficient, in my view, for affirming the judgment of the county court.

But, as the auditor finds the facts, Southgate did not undertake or promise, for the wife, or for himself and his wife, to see the debt paid; but it is, by its very terms, his sole promise. Some of my brethren, who concur in the result, think the case should stand upon this ground. If it should be objected, as a result of this doctrine, that it creates difficulties in suing, where a *feme covert* is debtor, and the statute has run; it is, in my opinion, a sufficient answer to such objection to say that that is no reason why a statute, which has eminently been styled a statute of repose, and which had its foundation in part, as it is said, in the civil law, as a punishment for the negligence of the creditor, should not have its effect. The plaintiff might sue at an earlier day. In the case before us the claim is of some fifteen years' standing. It is possible an action might have been maintained on the promise, against Southgate alone, but this is a point not before the court, and no opinion is expressed upon it.

Judgment of the county court is affirmed.

HEALD v. SARGEANT.

[15 VERMONT, 503.]

UNDER A WRIT OF ATTACHMENT ISSUED AGAINST ONE TENANT IN COMMON OF A CHATTEL, the officer may seize upon and take in his possession the chattel.

TO MAKE AN OFFICER A TRESPASSER AB INITIO HE MUST ABUSE THE SAME AUTHORITY upon which was the original taking. Thus an officer who has seized under a writ of attachment a chattel in which the defendant is a tenant in common, is not, by his subsequent sale under execution of the entire property in the chattel, constituted a trespasser *ab initio*, who may be sued in trespass as for an original unlawful taking.

TRESPASS for the taking of a bureau. Defendant pleaded that as constable he had levied upon the bureau, by virtue of a writ of attachment issued against one Walker, who, with plaintiff, was the owner thereof. That subsequently judgment had been recovered against Walker, in the action in which said writ of attachment had issued, and that thereupon, after the property had been duly advertised, he had sold the same at public auction, to the highest bidder, and that this constituted the supposed trespass set forth in plaintiff's declaration. Plaintiff's replication traversed the ownership of Walker. Upon the trial defendant obtained verdict, whereupon plaintiff moved for judgment *non obstante veredicto*. The motion was overruled.

N. Richardson, for the plaintiff.

D. Kellogg, contra.

By Court, REDFIELD, J. Many questions have been moved by the counsel in the discussion of this case, which we are not prepared to determine. In the case of *Ladd v. Hill*, 4 Vt. 164, it would seem to have been determined, that a sale upon execution of the entire chattel, although upon the debt of but one of the tenants in common, did divest the title of the other tenant, and was, in law, a conversion of his interest. Where the taking was on the execution, the sale would, in that view, be such an abuse of the authority, as would make the officer a trespasser *ab initio*. We are now asked to extend the same rule so as to make the taking upon the original writ a trespass. The case of *Melville v. Brown*, 15 Mass. 82, as understood by the same court in *Weld v. Oliver*, 21 Pick. 559, would seem to be an authority to that extent. But the case, as reported, only shows a taking on the same process, on which the sale was made. It does not seem to have been much considered, by court or counsel, and being a mere abstract of the point decided,

can not be much relied upon, as an authority. And it being a well-settled point, that the attachment of the whole property, and the whole proceedings, under the first process, were legal and regular, we could not make the officer a trespasser for any irregularity in the sale upon the execution, which is a distinct matter. To make an officer a trespasser *ab initio*, he must abuse the same authority upon which was the original taking. The entire doctrine of making officers trespassers by relation, for an abuse of authority in law, rests upon not well-defined ground, which commends itself to our sense either of reason or justice. It is but a technical rule of law, and one which it would be almost absurd, and wholly unjustifiable, to extend the length now asked for. The view we have here taken of this point, renders it unnecessary to go further in the case.

Judgment affirmed.

WING v. HURLBURT.

[15 VERMONT, 607.]

HUSBAND IS NOT LIABLE TO AN ATTORNEY EMPLOYED BY HIS WIFE for services performed in resisting a petition for divorce preferred by the former, or in prosecuting a similar petition for the latter.

ACTION upon book account. The main item in the account consisted in a claim by plaintiff for reimbursement for professional services rendered to the wife of defendant, in resisting a petition for a divorce preferred against her by defendant, and in prosecuting a cross-petition, filed by her, in which she sought a divorce upon the ground of her husband's intolerable cruelty. It appeared that the former petition was denied, and the latter granted by the court. The court below allowed this item in the taking of the account. The other facts appear in the opinion.

J. A. Vail and W. K. Upham, for the defendants.

Plaintiff, *in propria persona*.

By Court, WILLIAMS, C. J. The principal question in this case is, whether the defendant is liable to the plaintiff, for professional services, rendered for the wife of the defendant, in procuring a divorce from him, and in resisting the petition, which he preferred for the same purpose. There was no engagement or employment of the plaintiff by the defendant, but the services were evidently performed, contrary to his wishes and inclination; and if he is liable, it is on his assent, as result-

ing from the circumstances of the case, implied by law, even against his express wishes.

The husband is liable for necessities furnished his wife, under such circumstances that it may be presumed he would have consented; but this usually means necessary meats, drinks, clothing, medicines, etc. When he turns her out of doors, without fault on her part, or she is compelled to abandon his house on account of his cruelty, she carries with her a credit, for such necessary articles as may be essential to her maintenance and support, and everything necessary for her safety and preservation. For this purpose, legal assistance has been deemed, in some cases, to come within the meaning of necessities, for which the husband is liable. To exhibit articles of peace against him, to lay him under bonds to keep the peace towards her, is necessary for her personal security, to protect her from personal violence. This was the decision of Lord Ellenborough in the case of *Shepherd v. Mackoul*, 3 Camp. 326. When the wife was compelled to institute proceedings against him, in law and equity, to compel him to furnish her with a support and maintenance, the legal assistance furnished was deemed necessities, for which the husband was made liable: *Williams v. Fowler*, cited in Clancy's Rights of Married Women, 52. In all such cases, it is for a jury to determine whether her treatment was such as to justify any person in furnishing her with support, or legal assistance, contrary to the wishes of the husband, and where the law will declare his assent thereto. But to dissolve the bonds of matrimony between them, on her request, or to resist his petition for that purpose, can not be considered as necessary for her safety or preservation so as to enable her to procure professional assistance therefor, on his credit and at his cost. No case is found where this was ever attempted. In the ecclesiastical courts in England, costs may be decreed in any case when the court think proper. Hence it is not unusual to decree costs to be paid by the husband, in suit for a divorce. The case of *D'Aguilar v. D'Aguilar*, 3 Ecc. R. 329, was of this description. The courts may, in such case, decree temporary alimony, while the suit is pending, not only for the support of the wife, but to enable her to prosecute or defend the same. But all the powers of this court on the subject of divorce are given by statute, and the court is not authorized, either to decree temporary alimony, or award costs: *Harrington v. Harrington*, 10 Vt. 505.

As the legislature have not thought proper to authorize the

court to give cost in such case (and the reasons are obvious and forcible why they should not), we can not indirectly amerce the losing party, with the expense of the proceeding, as we should if a judgment for the plaintiff could be had in this case. If such a recovery can be had in a court of law, it would necessarily lead the auditors or jury, to re-examine the ground on which the court proceeded in granting the divorce: whether the evidence showed either the necessity or expediency of prosecuting or defending the petition. Or else, to avoid this inquiry, a recovery must be permitted against the husband for professional assistance rendered in all cases of an unsuccessful application on his part, if it was defended by the wife, and in all cases of successful application on her part. The refusing the petition in the one case, and granting it in the other, would imply a fault and neglect of duty in the husband. And the rule could not be reciprocal, if the wife was the guilty party, or preferred a slanderous and groundless petition, unless she or her friends could be compelled to give him security for costs in case of failure. The objections to a recovery are so formidable, and the case is so wholly unsupported by precedent, that we are not prepared to adopt a new principle in relation to the liability of the husband, and sustain an action where none has heretofore been brought or sustained. The plaintiff, therefore, can not recover of the defendant for professional services rendered on either of the petitions, brought by the defendant or his wife.

The question in relation to the tender was decided in the case of *Pratt v. Gallup*, 7 Vt. 344. Where a party intends to rely upon a tender, he can not make the tender on the trial before the auditors, but must bring the money into court. It was also decided, in that case, that goods or services furnished or rendered, after the commencement of the suit, became a part of the account, and the party furnishing or rendering them, was not obliged, at a time subsequent to the charge, and while the suit was pending, to receive the pay for a single charge, at the hazard of having this payment turn the suit against him. If this produces either inconvenience or injustice, it can not be remedied by the court, but must be the subject of legislative enactment. The judgment of the county court is reversed, and judgment will be rendered for the plaintiff to recover the other part of his account, amounting to two dollars and seventy-one cents.

The defendant will recover his cost in this court, to be deducted from the cost awarded to the plaintiff in the county court.

IDE & SMITH v. STANTON.

[15 VERMONT, 685.]

STATUTE OF FRAUDS APPLIES TO EXECUTORY CONTRACTS OF SALE as well as to contracts for the immediate sale and delivery of goods, and equally in the former case as in the latter requires written evidence of the contract. Whether this would be the case were the goods to be delivered in the future, to be manufactured by the seller, or were some important alteration in their form to be effected by him before delivery, not decided.

WRITTEN EVIDENCE OF CONTRACT required by the statute of frauds need not be contemporaneous with the contract. A written admission of a previous verbal contract will suffice. Nor need it be all in one instrument; different writings, each of which is signed by the party, may be brought together.

NOTE OR MEMORANDUM OF BARGAIN REQUIRED BY THE STATUTE OF FRAUDS upon a contract of sale must express the price upon which the sale was effected, or it will be insufficient.

ASSUMPSIT upon a contract for the sale of wool. The parol evidence showed that defendant had applied to plaintiffs to purchase from them three hundred and fifty to four hundred pounds of wool at fifty cents. Plaintiffs had not that amount of wool in their possession, but expected to receive enough to make it up, and it was agreed between them and defendant that the latter should take this wool when it came. There was no written memorandum made of this contract at the time, nor was anything paid as earnest, nor was there any delivery of any part of the wool. Plaintiffs, however, introduced in evidence, two letters from defendant to them; in the first of which he informed them that his purchase had been made on account of Messrs. Batchelder, and that they had not yet supplied him with money to meet his liability to plaintiffs; in the second letter, he informed them that his principals refused to take the wool, but that he would abide by his bargain. In neither of these letters was there any reference to the price agreed to be paid for the wool, either in gross or by the pound. The court below held that there was no proper evidence of the contract, and directed a verdict for defendant.

T. Bartlett, for the plaintiffs.

C. Davis, contra.

By Court, ROYCE, J. Two questions arise upon the bill of exceptions: 1. Whether the present is a case within the statute for the prevention of frauds and perjuries? 2. If it is, whether

the written evidence produced upon the trial was sufficient to satisfy the requirements of the statute.

It was the prevailing opinion, for a time, that the statute applied only to contracts for the immediate sale and delivery of goods, and did not extend to any case of an executory contract. This distinction arose from what was said by the court in *Clayton v. Andrews*, 4 Burr. 2101. But since the decision in *Rondeau v. Wyatt*, 2 H. Bl. 63, no such general distinction has been recognized or acted upon: *Cooper v. Elston*, 7 T. R. 14; *Bennett v. Hull*, 10 Johns. 364. And in order to exempt an executory contract from the operation of the statute, it has been required to appear that the thing contracted for was to be manufactured by the seller, as in *Towers v. Osborne*, 1 Stra. 506; *Crookshank v. Burrell*, 18 Johns. 58 [9 Am. Dec. 187]; *Sewell v. Fitch*, 8 Cow. 215; or that some important change in its condition was to be effected by him before delivery, as in the case first cited, where the sale was of a certain quantity of wheat, which remained to be thrashed by the seller before the contract could be executed. And it would seem that even these facts would not be sufficient in England, at this day, to take a case out of the statute. I infer this from the decision in *Garbutt et al. v. Watson*, 5 Barn. & Ald. 613, where the plaintiffs, being millers, contracted to sell to the defendant one hundred sacks of flour, to be ground from their stock of wheat, subsequently to the contract of sale. It was held to be a case within the statute. The case at bar does not require us to go the length of this last decision. The plaintiffs had part of the wool on hand at the time of making the contract, and they relied upon collecting, and receiving in, the residue before the stipulated time of delivery. There is nothing in the case to justify us in pronouncing it a sale of non-existing property, or of property not then owned by the plaintiffs and subject to their control. It is, therefore, but the case of an executory contract, substantially like that of *Cooper v. Elston* already cited. We regard it as a case within the statute.

The exceptions state that no part of the wool was delivered, and no money or other thing paid. It was, therefore, a case, where a written "note or memorandum of bargain" became necessary. The statute has never required, that the written evidence of the purchase should be created at the time of making the contract. A written admission of a previous verbal contract will satisfy the statute. Neither is it essential that all the written evidence, necessary to constitute a sufficient note or memorandum of the bargain, should be comprised in a single paper

or document. Distinct writings, and of different dates, if signed by the party to be charged, and properly conducing to prove the contract, are competent evidence in this class of cases. But since the whole object of the statute is to guard against the danger of fraud and perjury, in proving the contract, it is obviously indispensable that enough should appear in writing to show that a contract of purchase has been concluded, which is legally binding upon the party sought to be charged. The written note or memorandum must, therefore, either by its own language or by reference to something else, contain such a description of the contract actually made, as shall obviate the necessity of resorting to parol evidence, in order to supply any term of the contract, which was essential to give it validity. The defendant's letters, which are relied on as furnishing the requisite written evidence in this case, disclose the names of the parties, and the subject-matter of the purchase, but are silent as to the price agreed to be paid. This, it is insisted, was but the consideration of the bargain, which, according to *Egerton v. Mathews*, 6 East, 306, need not appear in writing. But in that case, the price was distinctly stated in the writing, and the question was, whether, as the contract could not have been enforced against the plaintiff (for want of his signature to the memorandum), the defendant was bound by it, without some consideration, apparent upon the writing, beyond his own admitted obligation. It was decided that no such additional consideration was required to appear in writing. And this, it is believed, is the extent of all the decisions which have professed to follow out the doctrine of *Egerton v. Mathews*.

It is evident, then, that the sufficiency of the note or memorandum under consideration, must depend upon the import of the word bargain as used in the statute. And its appropriate legal signification, independently of its connections with other expressions in the act, is the one to be sought. In this respect it differs from the word agreement as used in the same statute, which, from the peculiar phraseology of the section in which it occurs, has been held susceptible of a meaning somewhat short of its strict legal import, and to be synonymous with special promise or undertaking: *Smith v. Ide*, 3 Vt. 290. Now we find it laid down by Judge Kent and other writers upon the common law, when speaking of the legal requisites of a bargain, that "the price is an essential ingredient in the contract of sale, and it must be real and fixed, or be susceptible of being ascertained in the mode prescribed by the contract, without further negotiation

between the parties:" 2 Kent's Com. 477. This accords also with the rule of the civil law, "that the price ought to be established, for there can be no bargain without a price."

Since a stipulated price is thus seen to enter into the legal contemplation of a bargain, we could not doubt, even in the absence of more direct authority, that when the statute came to require written evidence of the bargain, it intended that the price, like other essential terms of the contract, should be proved by such evidence. This conclusion, however, is not left to rest upon mere inference from the statute, since it is abundantly confirmed by the decisions both at law and in equity: *Blagden v. Bradbear*, 12 Ves. 466; *Clerk v. Wright*, 1 Atk. 12; *Bromley v. Jefferies*, 2 Vern. 415; *Elmore v. Kingscote*, 5 Barn. & Cress. 583. In these cases the memorandum was adjudged to be fatally defective, upon the sole ground that it did not disclose the price. It is needless to mention the numerous cases, where this defect has been noticed in connection with others. It is manifest that the bargain in this case, was not proved by the written evidence, and the judgment of the county court must be affirmed.

Judgment affirmed.

SANBORN v. MORRILL.

[15 VERMONT, 700.]

TO THE MAINTENANCE OF AN ACTION OF TROVER BY ONE TENANT IN COMMON of a chattel against the other, a destruction of the property by the latter is essential.

SALE OF CHATTEL BY ONE TENANT IN COMMON is not such a destruction of the property as will authorize an action of trover by the other. In such case the other tenant may either disaffirm the sale and stand as co-tenant with the purchaser, or else affirm it, and call the seller to an accounting for the proceeds.

TROVER. The evidence offered by plaintiff on the trial, and which was excluded as insufficient by the court, was to the effect that he and Isaac M. Sanborn were originally tenants in common of the logs, the conversion of which was charged in this action; that Isaac M. pledged an interest in the logs to defendant, and that thereafter defendant floated them down to a saw-mill, caused them to be sawed into planks, disposed of the planks, and refused to account for the proceeds of the sale, to plaintiff. This evidence, as said before, was rejected by the court, which directed a verdict for defendant.

N. Baylies, for the plaintiff.

Upham and Hibbard, contra.

By Court, HEBARD, J. For the purpose of considering this question, the facts offered to be proved by the plaintiff, and excluded by the court, must be considered as true. The defendant, then, stood in the same relationship to this property that Isaac M. Sanborn did, so far as the plaintiff's interest in the property comes in question. And the plaintiff and the defendant became tenants in common of the property; for when Isaac M. transferred to the defendant his interest in the logs, the latter stood in the place of Isaac M.; and if he transcended the power and right conferred upon him by Isaac M., still that would not necessarily affect the legal rights of the plaintiff.

It seems to be conceded by the counsel, and so are the authorities, that one tenant in common, of personal property, may maintain trover against his co-tenant, for a destruction of the property. So that the question to be determined, in the present case, is, whether a sale of the chattel, for this purpose, is equivalent to its destruction. The question upon which the case is to be determined, belongs to the class of technicalities; for if the facts exist which the plaintiff offered to prove, there is no doubt that the plaintiff is entitled to some sort of remedy; and the question is, in relation to the form of the action. In other words, the question is, whether the remedy shall be by action *ex delicto*, or *ex contractu*.⁹ And upon this point the authorities, to some extent, are conflicting; and the case, like many others, must be settled by the weight and current of authorities. If the question was entirely *res integra*, it could not be regarded as very important which way it should now be settled; but the doctrine of *stare decisis*, even in matters of form, and technicalities, is not to be disregarded.

In determining this question, one or two points here are worthy of consideration, before proceeding further. We have already remarked that this action may be maintained for a destruction of the property by one tenant in common against his co-tenant; and those authorities which sustain the action, do so upon the notion that a sale is equivalent to destruction. I think there is a difficulty in sustaining the action upon this ground. If the defendant had no right to sell this property, then his attempting to do so did not divest the plaintiff of his interest in it; and while the plaintiff had an interest in the property, so that he could pursue it, I can not see how it can be said that the property was destroyed. There can be no destruction of the property arising from the sale, only upon the supposition that

the defendant was authorized to sell it; or, having sold it, that the plaintiff has ratified the sale; and, in either of these cases, it would not be pretended that the plaintiff could maintain trover; but the action should be in form *ex contractu*. Another reason exists in this state, that does not in some other states, why the action should not be sustained upon doubtful authority; and that is, the distinction which our statute has made between actions founded on contract, and those founded on tort, the body being free from arrest in one case and not in the other.

There have been a variety of decisions, bearing upon this case. The plaintiff relies upon *Wilson & Gibbs v. Reed*, 3 Johns. 175. In that case, Judge Spencer says, that "for a sale of a chattel, an action of trover will lie, by one tenant in common against another." The question, however, is very little discussed by the judge in giving this opinion; but he is merely understood to affirm the opinion and charge of Judge Kent in the circuit court, who there says that "the presumption is that the rum had been retailed by the defendant, which in law, was a destruction;" and whether the nature and kind of property, had anything to do with the propriety of sustaining the action, in the minds of either court, does not appear; but it seems to have been sustained upon the principle, that the sale was a destruction of the chattel. The case of *Weld v. Oliver*, 21 Pick. 559, is also a prominent authority relied upon by the plaintiff, and there is no doubt but it goes as far, at least, as the case under consideration. But there will be some difficulty in following out that case. The case goes upon the ground, that there must be a destruction of the property; and still Judge Dewey goes on to show that the property, in that case, still had a legal existence. He says that "the unlawful sale by the first vendor, of the property, does not necessarily impair the rights of the other co-tenant, or pass any title, unless he ratify the sale." It would be difficult to understand how, in a legal sense, there can be a destruction of the plaintiff's property by a sale, which does not even "impair his right or pass any estate." And he goes on to say, "that you may proceed by action, either against the first or any subsequent vendor." The two cases above cited, if followed, would, without doubt, be authority to sustain the present action. But it is believed that the weight of authority is the other way; and such authority, too, as we are not at liberty to disregard.

The English authorities, though not as decisive and not as much to the point as might be desirable, if they alone were to

be relied on, go very far to sustain the doctrine, that for a sale by a tenant in common, his co-tenant can not maintain trover, but that there must be a destruction of the property. The case of *Oviatt v. Sage*, 7 Conn. 95, holds the converse of the doctrine which is attempted to be established by the two cases before cited. In that case, Oviatt and Cobb were tenants in common of a quantity of cheese, and Cobb sold the cheese to Sage, and Sage disposed of the cheese in market, and refused to account with Oviatt, who sued him in an action of account, and the objection taken, was that it should not have been account but trover, the sale being a destruction of the property. But the court (Judge Daggett) denies that doctrine, and says that nothing short of a destruction of the property will make a co-tenant liable in trover; and in short, that a sale is not equivalent to a destruction of the property. In the case of *Oviatt v. Sage*, the court seem to put some stress upon the fact, that the property, in that case, being cheese, was intended for market, and that the sale of the article was in accordance with its original destination. I apprehend that consideration is not altogether unimportant; and if important in that case, it is equally so in the present. These pine logs were useful to the owners, only as an article of traffic and sale. The case of *Webb v. Danforth*, 1 Day, 301, is to the same import; and also Swift's Dig. 170. All go upon the ground that the sale of the chattel makes the purchaser co-tenant with the other owner, and does not pass his title to the property. And such is the reasoning of Judge Dewey, in the case of *Weld v. Oliver*. When one tenant in common makes sale of the whole chattel, the other tenant has his election, either to disaffirm the sale, and stand as co-tenant with the purchaser, or to affirm the sale, and call the seller to his accounting for the proceeds. And when he ratifies the sale, it ceases, of course, to be a tortious act.

But there is another view of this case, aside from the authorities to which I have referred. We are disposed to regard this as not an open question. The case of *Tubbs v. Richardson*, 6 Vt. 442 [27 Am. Dec. 570], has settled the law in this state; and, to sustain the present action, would overturn the whole doctrine of that case. There is but one feature in that case to distinguish it from the present, and that is not of the essence of the question. In that case, the whole of the property thus owned in common, was not sold. But that can not alter the principle. It was not upon that principle that the action in 21 Pickering, was sustained, for, in that case, the whole of the salt was not sold. The only reason for such a distinction is, that if less than half is sold,

it may be considered as working a severance of so much of the property, if it is a commodity susceptible of being severed. But that argument is answered by saying, that the authorities agree that one tenant in common can not compel a severance.

In the case of these logs, there was no tortious taking, for one tenant in common has as good a right to the possession as the other; and each tenant owned an undivided half of each log, and so it was in the case of the wool. The right of action, then, could not be made to depend upon the fact, whether the whole, or only a part, of the property was sold. If selling the whole would be unauthorized and tortious, so equally, in principle, would be the selling a part. When this distinction is disposed of, the two cases are parallel. And this is a distinction without a difference. And even if it might be said that a different determination of that case should have been made, that will avail us nothing, unless we now come to the determination to overrule that case. But the case of *Isaacs v. Clark*, 12 Vt. 681 [36 Am. Dec. 372], shows that the court had no disposition to disturb the doctrine settled in the case of *Tubbs v. Richardson*. And although, as is said, the reasoning of Judge Bennett in that case was not called for by the question to be decided, it shows that the court were disposed to adhere to the doctrine. As we have already said, we consider the law upon this point settled by the case of *Tubbs v. Richardson*,¹ and if the doctrine of *stare decisis* is worth preserving, the conclusion, in the present case, would seem to be inevitable.

Judgment of the county court affirmed.

ARMINGTON ET AL. v. TOWNS OF BARNET, RYEGATE, AND NEWBURY.

[15 VERMONT, 745.]

COURT CAN NOT PRONOUNCE ACT OF LEGISLATURE VOID for any supposed inequality or injustice in its intention or operation, if the act relate to a subject-matter within the scope of legislative authority and the provisions of the law be general.

DECISIONS OF COURTS OF THE UNITED STATES ARE OF PARAMOUNT AUTHORITY, where the point to be determined is whether a state law contravenes any provisions of the national constitution.

STATUTE IS CONSTITUTIONAL THAT AUTHORIZES THE CONDEMNATION OF THE FRANCHISE or easement of a turnpike corporation, where the public good requires a public highway over such easement, or the land in which it exists.

PETITION to obtain the appointment of commissioners to lay out a public highway through such parts of the towns of Barnet, Ryegate, and Newbury, as were traversed by the turnpike of the Passumpsic Turnpike Company. Commissioners were appointed, who made a report, and upon its return the turnpike company and the towns of Barnet and Ryegate objected to its confirmation upon the ground of the unconstitutionality of the act upon which this proceeding was based. The other facts sufficiently appear in the opinion.

O. Davis, for the defendant.

E. Paddock, for the petitioners.

By Court, REDFIELD, J. The only question arising in the present case, is, as to the constitutionality of the statute of 1839, authorizing the supreme and county courts, in this state, to take the franchise, or easement, of any turnpike corporation, when, in their judgment, the public good requires a public highway over such easement, or the land in which such easement exists. It is now too late in the day, and the law upon this subject is too far settled, to go into the discussion of elementary principles. No one now questions the right of the highest judicial tribunal in a state to declare an act of the legislature void, when its provisions conflict, either with the state or the United States constitution. On the other hand, it is, at this day, I apprehend, equally well settled, that no court can pronounce any act of the legislature void, for any supposed inequality or injustice in its intention, or its operation; provided it be upon a subject-matter fairly within the scope of legislative authority, and the provisions of the law be general. Hence it is true, no doubt, that the legislature, by general enactments, might tax any given species of property, either private or corporate, to the full value of the property itself; for the power of taxation, when once conceded to the legislature, over any given subject, "implies the power of destruction" even, as was declared by the court in the case of *McCulloch v. The State of Maryland*, 4 Wheat. 316. And the legislature having, in the present case, referred the question of discretion, as to the necessity of taking the franchise, to the courts, can make no difference, so far as regards the present question.

The only question which we now propose to consider, is the power of the legislature to take the road of a turnpike company, for a public highway, upon making adequate compensation. This is the first time this court have been called upon to

discuss this naked question. But similar questions have been before us, arising under the same act; and the question has, of late, been so fully discussed, both in the national and state tribunals, that little more remains for determination, unless we are prepared to disregard the aid and authority of those numerous determinations which have so commended themselves to the learning of the profession and the good sense of the public generally, that one, who should now attempt to run counter to their general current, might incur the imputation of rash self-confidence, if not the suspicion of foolhardiness, even. This is not said as a justification for an opinion, which is esteemed questionable in its principles, but as an excuse for forgoing the labor of an extended discussion of the foundation of those principles, which is much better done in the cases which will be referred to. In all cases of constitutional law, the determinations of the state tribunals, upon similar questions, are entitled to very great weight; but, in a case like the present, where the act is alleged to contravene the provisions of the United States constitution, the decisions of the national tribunals, upon the point, are of paramount authority. We come, then, to a brief consideration of the question involved, upon the grounds thus indicated.

It is not claimed, I apprehend, as I have before said, that there is any power in this court to declare the statute in question void, except so far as it shall be found fairly and necessarily to conflict with some express or necessarily implied provision, either of the state or United States constitution. It is not claimed that this statute does conflict with any such provision of the state constitution, or with any portion of the United States constitution, unless it be that which prohibits the states from passing any "law impairing the obligation of contracts:" Art. 1, sec. 10. The general power of the legislature to take private property for public uses upon making adequate compensation, is universally conceded, and seems to be expressly granted by our "declaration of rights," part first, state constitution, article 2: "That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money."

It has never been questioned, that the legislature had the full power to take private property for the purpose of public highways. They may grant this power to a private corporation, as was done to the defendants. It is now settled, in most of the

states, that this privilege may be granted to a railroad corporation, which is considered but an improved mode of constructing highways: *Bonaparte v. C. & A. R. R. Co.*, 1 Baldw. C. C. 205; *Raleigh & Gaston Railroad Co. v. Davis*, 2 Dev. & B. 451; *Bloodgood v. Mohawk & H. R. R. Co.*, 14 Wend. 51, and same case again, 18 Id. 9 [31 Am. Dec. 313]; *Louisville C. H. R. R. Co. v. Chappell*, 1 Rice, 383. But it is argued that such a grant, when once made to a private corporation, is a contract, irrevocable, and inviolable. No doubt it is such, just as such, and no more, than was the original grant of the land. All land is, in fee, the property of the sovereignty. Originally it forms a portion of the public domain, until parceled out to private persons, either natural or artificial. All such grants are contracts, irrevocable, and inviolable. Hence if there be a condition, beneficial to such grantees, annexed to the grant, as, for instance, that such land shall be forever exempt from taxes, this exemption becomes perpetual: *State of New Jersey v. Wilson*, 2 Pet. Cond. 457; *Herrick v. Randolph*, 13 Vt. 525. The same is true of the grant of any corporate franchise. But there is no sound reason why the one case of grants should be esteemed any more sacred than the other. Both classes of grants are always understood to be made subject to those reserved rights in the state which are indispensable to state sovereignty. For instance, the grant of the fee in land to private persons does not authorize them to exercise any of the acts of sovereignty, as such, even within the bounds of their own territory, or of resisting the proper sovereign in the exercise of those rights. Those reserved rights of sovereignty, which, by law writers, are denominated the right of eminent domain, always exist as a condition, or implied reservation, in all these grants, whether of lands in fee, or of corporate franchises.

While, on the one hand, it is admitted, that no grant of the legislature, of either of the above descriptions, can be revoked or repealed in express terms, it must be conceded that this right of eminent domain will always enable the legislature to take the benefit of the grant from the grantees, for public use. But this is one of those rights of sovereignty, which, to be of any avail, must be general and unlimited, and when it is remembered that it can not be done without the "owner receiving an equivalent in money," and that the legislature are always exercising it by general laws, and upon their own constituents, there is but little danger of abuse. Hence, it was decided in the case of *Charles River Bridge v. Warren's Bridge*, 11 Pet. 539, that the legislature

might grant a free bridge parallel with, and as near, as they judged the public good required, to toll bridges formerly granted by them, and this upon their general powers, without an assertion of the right of eminent domain in the land, out of which the franchise was granted, and of course, without compensation. After this decision, which, in regard to the United States constitution, must be considered a binding authority, it surely can not be doubted, that the legislature have the right to take the franchise, upon making a full equivalent to the corporation. This latter course seems to me to be the true one. It can not escape the observation of any one that the lapse of almost half a century, since the grant of this franchise, must have made a very considerable difference in the public wants, and the public claims to an open highway. If this franchise is not absolutely perpetual and uncontrollable, the time has doubtless come for the legislature to assert its right to interfere, and establish such a highway as the public exigencies now require. And in doing it, in this mode, there is no appearance of quibbling, or evasion, or of injustice and severity, which, whatever may be thought by the learned of the soundness of the decision last quoted, 11 Pet. 539, will be likely to be objected to it by plain, simple, unsophisticated, and unprejudiced minds. It is no doubt a sound legal decision, and the only one the court could have pronounced; but, unfortunately, it is not easy to assign reasons which very strongly commended themselves to our sense of justice. We are apt, in that case, to confound the decision of the court with the act of the legislature. While all now admit that the decision is sound and the act constitutional, it is, nevertheless, a precedent in legislation, that will not be likely to be often followed, and never, except in the most extreme cases. The present case is free from all show either of injustice or severity.

The report is accepted, and the road established and ordered to be opened, and the damages and costs paid in one year.

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

UNITED STATES v. COTTINGHAM.

[1 BORDEN, 615.]

CONTRACTS OF ENLISTMENT are not governed by the same principles that regulate the validity of ordinary contracts.

ACT OF CONGRESS OF MARCH 16, 1802, prescribing qualifications of soldiers enlisting in the army of the United States, was designed for the benefit of the government, and is in no part founded upon a supposed disability of the recruit to bind himself by his contract of enlistment.

ALIEN VOLUNTARILY ENLISTING IN ARMY of the United States has no right to claim exemption from the consequences of his own voluntary engagement, and to be discharged from service on account of his alienage.

VOLUNTARY ENLISTMENT IS NOT VOID because the recruit does not possess the qualifications prescribed by the act of congress of March 16, 1802; the act, in such a case, merely subjects the recruiting officer to punishment for his disregard of the legislative instructions.

IT IS NO JUST CAUSE FOR DISMISSION FROM SERVICE that a recruit has practiced an imposition upon the government in regard to his qualifications.

PETITION for writ of *habeas corpus* presented by George Cottingham, alleging that he is an alien; that on coming to this country he enlisted in the army of the United States for three years; that on the expiration of that time, he re-enlisted in another regiment for five years; that he has not taken any oath of allegiance to the United States, nor any steps towards naturalization; that being an alien, he can not be legally enlisted; that he is illegally detained in Fortress Monroe. The writ was granted, directed to Colonel Fanning, and the petitioner was brought before the circuit court of Norfolk county; by which court, the petitioner was held to be illegally detained in custody,

and he was ordered to be discharged. A writ of error, on petition of the United States, was awarded.

Nicholas, for the plaintiffs in error.

Segar, *contra*.

BALDWIN, J. The error in the argument of the appellee's counsel consists in treating the enlistment in question merely as a contract, and as subject exclusively to the principles affecting the validity of contracts. A contract it undoubtedly is in a certain sense, inasmuch as it is an engagement between the parties, for a service to be rendered by one of them, in consideration of a compensation to be yielded therefor by the other. But it wants one of the usual requisites of contracts, a reciprocal obligation in regard to the subject-matter. On the one hand, the recruit is bound to serve during the full term of his enlistment; but on the other, the government is not bound to continue him in service for a single day, but may dismiss him at the very first moment, or at any subsequent period, whether with or without cause for so doing. It has moreover a feature not to be found in most contracts; namely, a power in one of the parties to compel specific performance from the other by the exercise of physical force. If the soldier desert, he may be recaptured and coerced to the discharge of his duty by corporal restraint and punishment. These important traits of the engagement result not so much from the specific terms of the compact, as from the relation in which it places the parties towards each other; a relation of authority and control on the one side, and of obedience and submission on the other. It resembles in some respects the relation of master and servant, of the strictest kind between individuals; to wit, the condition of apprenticeship, or other indented servitude. And having regard to the circumstance that the government is one of the parties, it bears perhaps a still closer resemblance to the relation arising out of an appointment to a post or place under the civil administration; though, from the nature of the service, involving a sterner and more despotic supremacy. In fact, the enlistment is an appointment by the government of an individual to the lowest grade of military service; differing only from the commission to an officer, by the inferior rank, emolument, and duties, and the incapacity to retire by voluntary resignation. It is commonly founded in compact, but not necessarily so; for the government, as the administrative sovereign of the country, has an unquestionable right, in certain emergencies, to call the inhabitants

capable of bearing arms into its military service, and, by some equitable rule, to select from the whole number those best adapted to the purpose, and this without regard to their consent.

Now it can not be doubted that the government, like an individual, in regard to appointments to its service, may prescribe the requisite qualifications, and insist upon or waive them in its discretion; and that the person appointed or selected has no right to relieve himself from his engagement, by objecting his own want of qualification. And so it is equally clear, as the act may be done through the instrumentality of an agent, that if he should transcend or neglect the instructions of his principal in regard to qualification, the latter is not obliged to repudiate the transaction, but may sanction and confirm it without the concurrence of the other party to the engagement.

Let us now inquire how far these principles are applicable to the case before us. And this must depend upon the legislation of congress on the subject. The question may be considered as arising on the construction of the act of congress of the sixteenth of March, 1802, fixing the military peace establishment of the United States; for though there has been subsequent legislation on the subject, it has no material bearing upon the present case. The provisions of the eleventh and twelfth sections of that act are as follows:

“Sec. 11. That the commissioned officers who shall be employed in the recruiting service, to keep up by voluntary enlistment the corps as aforesaid, shall be entitled to receive, for every effective, able-bodied citizen of the United States, who shall be duly enlisted by him for the term of five years, and mustered, of at least five feet six inches high, and between the ages of eighteen and thirty-five years, the sum of two dollars: provided, nevertheless, that this regulation, so far as respects the height and age of the recruit, shall not extend to musicians, or to those soldiers who may re-enlist into the service: and provided also that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent, guardian, or master first had and obtained, if any he have; and if any officer shall enlist any person contrary to the true intent and meaning of this act, for every such offense he shall forfeit and pay the amount of the bounty and clothing which the person so recruited may have received from the public, to be deducted out of the pay and emoluments of such officer.

"Sec. 12. That there shall be allowed and paid to each effective, able-bodied citizen, recruited as aforesaid to serve for the term of five years, a bounty of twelve dollars; but the payment of six dollars of the said bounty shall be deferred until he shall be mustered and have joined the corps in which he is to serve:" Story's L. U. S., p. 832.

These provisions, it will be seen, had a four-fold object: 1. To keep up the peace establishment of the army by voluntary enlistments; 2. To encourage recruiting, by a premium to the recruiting officer, and a bounty to the recruit; 3. To procure for the government recruits best adapted to the service, and protect it against inadequate selections; 4. To protect minors from their own improvident engagements. The protection to the government was afforded by the legislative instructions to the recruiting officer, and punishment for disobedience. The protection to the minor was extended in like manner, and still more effectually, by requiring the consent of his parent, guardian, or master. No protection was furnished or contemplated for the adult recruit. None whatever was requisite or proper. His want of qualification is best known to himself, and his entering the service is a fraud upon both the government and its agent, if the defect be unknown to the latter; and if known, then it is an act of collusion with him to deceive and injure the principal. His conduct, instead of entitling him to protection, ought to subject him to punishment; and accordingly in the British recruiting service, by statute 10 Geo. IV., c. 6, sec. 34, 7 Bac. Abr. by Dodd (Lond. ed. of 1832), p. 379, tit. Soldiers, letter A, he is justly exposed to very severe penalties.

It will be seen that the qualifications prescribed by this act of congress, for the regulation of the recruiting officer, are: 1. That the recruit shall be effective and able-bodied; 2. That he shall be a citizen of the United States; 3. That he shall be at least five feet six inches high; 4. That he shall be between the ages of eighteen and thirty-five years. These requisites were obviously designed for the benefit of the government, and in order to obtain recruits best fitted for the service. They are all placed on the same footing, without discrimination; all based upon the idea of qualification alone, all embraced in the same mandate, and all enforced by the same penalty. It is impossible to distinguish between the want of citizenship and the want of any other qualification; and if a recruit be entitled to his discharge because he is an alien, he would be equally entitled to it because only five feet five inches and eleven twelfths in

height, or thirty-five years and one day old. There is no better rule of interpretation than this, that "no statute shall be construed in such manner as to be inconvenient or against reason." If a recruit were to claim exoneration from the service, on the ground that at the time of his enlistment he was under size, or under age, or infirm in body, would it not be a sufficient answer that the government, in its discretion, waived the objection, because he had since attained the requisite height or age, or had recovered, or would probably recover, from his disease; or because he possessed qualities which would more than compensate for his alleged deficiencies? And so if the plea be that of alienage, is it not enough to say that, though constrained to the admission that the native or naturalized citizen must be supposed to possess greater valor, higher intelligence, and more approved fidelity than a mere stranger, yet there may be exceptions to the general rule; and that in the particular case the petitioner is a gallant and disciplined soldier, whose oath of fidelity when he took the bounty, and his long residence and connections and interest in the country, furnish sufficient security for the faithful discharge of his duties?

The law, in no part of it, is founded upon a supposed disability of the recruit to bind himself by his compact of enlistment. No such disability is recognized by the act even in regard to minors, but a mere protection granted to the immaturity of intellect, by requiring the consent of the parent, guardian, or master. Without that qualified exemption, boys of any age would be subject to enlistment in the army, as they are in the navy, not only without but against the consent of their natural or legal protectors; for the national sovereignty, in the exercise of its constitutional powers, may overrule the municipal laws of the states in relation to the incapacity of infants: *United States v. Bainbridge*, 1 Mason, 71. An alien has no right, founded upon any principle either of municipal or international law, to claim exemption from the consequences of his own voluntary engagement, whether for military or any other service. No one supposes that he labors under a disability in this respect; for though, by such a stipulation, he may by possibility involve himself in difficulties in regard to his allegiance to his native sovereign, that is a matter for his own consideration, and can not affect the validity of his new obligation. If any authority were necessary for so self-evident a proposition, it would be found not only in the practice of employing foreign mercenaries, which has prevailed amongst civilized na-

tions in all ages, but in the doctrine as laid down by the most approved writers: Vattel, b. 1, c. 19, sec. 213; 1 Bl. Com. 370.

The rules by which the courts refuse to enforce contracts that are contrary to law have no application to a case like this; for the contract of enlistment, if to be so called, is not obligatory upon the government, under any circumstances, and can not, as has been shown, be the less obligatory upon the recruit because he does not possess the requisite qualifications. The act of congress does not in that event declare the enlistment to be void, or exclude the recruit from the service, but merely subjects the recruiting officer to punishment for his disregard of the legislative instructions. That the legal prohibition amounts to nothing more than this, is obvious from the consideration that the penalty is founded exclusively upon the actual misconduct of the officer; for though its letter is broad, its spirit surely would not reach beyond the case of willful disobedience or culpable negligence; and such is the practical interpretation given to it by the war department: Army Regulations of 1841, pp. 126, 127. Now it would be a new principle to establish, that the misconduct of a public officer in the performance of an official act shall avoid the transaction, against the consent of the party aggrieved, and for the sole benefit of another party in no wise prejudiced: and it would be still more strange, if the act prohibited to the officer has been procured without his connivance or default, by the fraud of the party complaining.

In what has been said, I have regarded the law of congress as designed to regulate the recruiting service with a view to the qualifications of recruits, and not by such weighty considerations as a fear for the public safety, or a jealousy of executive power. If in the legislative mind the republic would be endangered by the foreign nativity or the debility of enlisted soldiers, a policy so grave would have been marked by decisive enactments, and not exhausted in petty penalties upon a subaltern officer. It is moreover remarkable, in reference to unnaturalized inhabitants, that, by a fluctuating legislation, the policy of employing them has varied, not according to the hazard, but the utility of their military services; for the authority to enlist them has been given to the recruiting officer in times of greatest peril, and withheld in those of greatest security. Thus by the acts of 1802, 1808, and 1815, he is directed to enlist able-bodied citizens; but by the acts of 1811, 1812, 1813, and 1814, the direction is to enlist able-bodied men: 2 Story's L. U. S., pp. 832, 1089, 1510, 1205, 1285, 1433. And in another branch of the public defense of not less import-

ance, and deeper solicitude to the nation, aliens are habitually and lawfully employed on that perilous field of her glory where the treacherous mercenary may find fit allies in the treacherous winds and waves. The act of congress of the third of March, 1813, "for the regulation of seamen on board the public and private vessels of the United States," 2 Story's L. U. S., p. 1302, throws light upon the present subject in two points of view; for in the first place it expressly declares, that after the termination of the then existing war with Great Britain, the employment of aliens on board all such vessels shall be unlawful, and adopts the most decisive and vigorous measures, both precautionary and vindictory, to prevent it; and then provides that the provisions of the act shall have no operation with respect to the subjects of any foreign nation which shall not, by treaty or special convention with the government of the United States, have prohibited the employment of native citizens of the United States on board of her public or private vessels. This act thus indicates, on the one hand, that where a policy of utter and unqualified exclusion from the service exists, it is not left by congress to a vague, indirect, and doubtful implication; and on the other, that such a policy is never dictated by a puerile jealousy or a petty apprehension of danger.

A case like the present may, I think, be safely left to executive discretion in the discharge of the constitutional duty to take care that the laws be faithfully executed; inasmuch as the exercise of that discretion, in the one way or the other, can be no encroachment upon the legislative power; for as the war department may dismiss a recruit without cause shown, so it is no good cause for his dismissal that he has practiced an imposition upon the government in regard to his qualification. This construction of the statute is, I think, in the true spirit of the law; while the opposite would open the door widely to the vilest frauds upon the public service. It is proper, however, to say, in justice to the petitioner, that the record of this case furnishes no evidence of his having practiced a fraud upon the recruiting officer. I have considered the case as standing upon the footing of an original enlistment; inasmuch as it does not appear from the record, that the petitioner's re-enlistment was into the company or regiment to which he belonged at or about that time. If such were the fact, there could not be even a plausible objection on his part to the validity of his engagement; because the acts of congress of the second of March, 1833, and the fifth of July, 1838, give a bounty to "every able-bodied non-commis-

sioned officer, musician, or private soldier, who may re-enlist into his company or regiment within two months before or one month after the expiration of his term of service;" thus dispensing with all other qualifications: Sess. Acts of 1832-3, p. 72, sec. 3; of 1837-8, p. 105, sec. 29. Whether the irregularity of re-enlisting into a different company or regiment would affect the question of qualification, I deem it unnecessary to consider: my impression is that it would not. However that may be, these acts serve to confirm the conviction, that in the legislation of congress on this subject, citizenship has never been regarded in any other light than as a mere qualification. I am of opinion that the judgment of the circuit court ought to be reversed, and the appellee remanded to the service.

The other judges concurring, the judgment of the circuit court was accordingly reversed, and judgment entered declaring that the defendant was lawfully detained in custody, and remanding him into the service of the United States according to the terms of his enlistment.

BROOKE, J., absent.

ENLISTMENT OF MINORS.—Under the act of congress empowering enlistments in the navy, an infant who has arrived at years of discretion, having no father, master, or guardian, may make a valid contract to serve according to the act, although he has a mother with whom he resides at the time, and whose consent was not obtained: *Commonwealth v. Murray*, 5 Am. Dec. 412; though the statutes of the United States, which prohibit the enlistment of a minor without the consent of his parent, etc., "if any he have," prohibit the enlistment of minors who have no parent, guardian, or master; and such enlistment, if not void, is voidable at the request of the minor so enlisted: *Commonwealth v. Cushing*, 6 Id. 156; and the statute provision that an infant shall not be enlisted without the consent of his parent or guardian, is for the benefit of the infant, and if it is not complied with, he may waive the irregularity and ratify the enlistment upon becoming of age: *State v. Dimick*, 37 Id. 197. In *United States v. Blakely*, 3 Gratt. 415, the principal case is referred to with approval, and the position there taken as to contracts of enlistment by minors explained.

COMMONWEALTH v. DABNEY.

[1 ROBINSON, 696.]

ACCOMPLICE, WHO GIVES TESTIMONY FAIRLY AND OPENLY, has no right to demand from the court in which he is tried for the same offense, a recommendation to the executive for a pardon.

DOCTRINE OF APPROVEMENT DOES NOT PREVAIL in this state.

DABNEY had been teller of the Bank of Virginia. One Green was a depositor at the bank, and by means of collusion with Dabney overdrew his account to a large amount on checks that were not good, and which Dabney knew to be not good. This continued for some time, till danger of detection having become imminent, Dabney fled, taking with him a large sum of the bank's money. Green was indicted on numerous charges, and Dabney having returned was indicted for embezzlement, and for permitting Green to embezzle the bank's money. On the trial of Green, Dabney was called as a witness for the commonwealth; and having been informed that he was not bound to give evidence that would criminate himself, and if he did give evidence, it must be without any expectation of favor or that he would thereupon acquire any right to pardon, yet he went on and gave in evidence all the circumstances touching the default and embezzlement. When his own trial came on, he moved the court to postpone the trial in order that he might apply to the executive for a pardon, claiming that he was entitled to one. After argument of the motion, the court adjourned the case to the general court, there to have the questions of law involved decided.

Baxter, attorney general, for the commonwealth.

Johnson, Scott, and Stanard, for the accused.

LEIGH, J. The counsel for Dabney in this court have contended that, according to *Rudd's Case*, 1 Leach, 115, an accomplice, who has been received by the court to give evidence against his associates, and who has fully and fairly given testimony against them, has a right to the recommendation of the court to the mercy of the executive, and a right to the pardon of the executive. In the case above referred to, Lord Mansfield uses this language: "There is, besides, a practice which does not give a legal right; and that is, where an accomplice, having made a full and fair confession of the whole truth, is in consequence thereof admitted as a witness for the crown, and his evidence is afterwards made use of to convict the other offenders. If in that case he acts fairly and openly and discovers the whole truth, though he is not entitled of right to a pardon, yet the usage, the lenity, and the practice of the court is to stop the prosecution against him, he having an equitable title to the recommendation of the court to the king's mercy." By this opinion the right to the pardon is denied to be a legal right, and is said to be a mere equitable one. It would seem,

then, that even in England this right to the recommendation of the court can hardly be said to be a right secured by the common law, but is a mere favor which the crown had determined to extend to accomplices. And we are the more inclined to consider this the correct view of the question, as this doctrine of the right of an accomplice to the recommendation of the court is to be found in none of the older writers on the common law. If this be the correct opinion, then this right of an accomplice never was introduced into the laws of this state.

But if it were established that this right of an accomplice was a part of the common law, we should still be of opinion that it never was a part of the law of this state: for no accomplice can, according to the constitution of our courts, be so received to give evidence as to entitle him to this right of pardon. According to the authorities, he must make a full confession of the whole truth. And according to the same authorities, neither the committing justice nor the prosecutor, nor even the attorney general, can so receive him; the power to receive him being given to the court alone. In England the accused is always examined by the committing magistrate, who reduces this examination to writing, together with the testimony of the witnesses. In this examination an accomplice may make a full and fair confession of the whole truth, before a person authorized to receive it. But in this state the accused is never examined, and we do not see in what manner this previous confession of the whole truth is to be made. The committing magistrate and the prosecutor are unauthorized by any law to take it; nor has the court any such authority. But admitting that the court has the right, where and in what manner is the confession to be made? Is the judge to go to the jail, or to send for the accomplice to his private room, and receive his confession in secret? This would be contrary to our practice, which has always been to administer justice openly and in public. Or is the accomplice to be brought into court to make his full confession openly and publicly? This would be unjust to him: for the court may not receive him as a witness, and his confession in open court, perhaps in the presence of those who may afterwards be called upon to try him, might greatly prejudice his case. It would therefore seem that no mode is provided by our laws, in which the full confession, required of an accomplice by the practice of the courts in England before he will be permitted to give evidence against his associates, can be made. But if this difficulty were removed, no mode is pointed out by our laws, for procuring the testimony

to enable the court to determine whether the accomplice ought or ought not to be received as a witness. According to the authorities cited, the admission in England of an accomplice to give evidence puts it in his power to entitle himself to a pardon. The permission, then, to give testimony is in effect the grant of the pardon. And surely the court ought to have all the evidence in the case, as well in respect to the accomplice as his associates, to enable it to decide whether it would be proper, in the particular case, to exercise the power of pardoning: otherwise it would often happen that the most guilty would secure his pardon, simply by giving evidence against others who had been led into guilt by the witness himself. It is probable that in England all the evidence is before the court, which may thus have the means of ascertaining the propriety of receiving the accomplice as a witness. But in this state, according to our present mode of proceeding, the evidence never is and never can be before the court. Therefore, if the right of an accomplice to a pardon were fully established in England, we should yet deny that the same right existed here.

We think, too, that the legislature, by enacting that "approvers shall never be admitted in any case whatsoever" (1 Rev. Code, c. 169, sec. 59, p. 614), has manifested its disapprobation of holding out impunity to an accomplice, as an inducement to him to become a witness against his associates. Indeed, some of the judges are of opinion that this law prohibits the offering of any such indemnity to an accomplice. But others of them think that the conditional right to pardon now contended for would not have been taken away by that law, if such right had existed at the time of the enactment. A majority of the court, however, are of opinion that the act in question evinces the legislative disapprobation of the principle now contended for in behalf of the accomplice. What was the objection to permitting an accomplice to become an approver? Certainly, that thereby he might be tempted to screen himself by giving false testimony against others. The right to pardon now insisted on holds out the same sort of temptation, though in a less objectionable manner. And as the legislature has manifested its disapprobation of holding out such a temptation in case the witness appeared in the character of an approver, we think it may fairly be inferred that it would equally disapprove of holding out a temptation of a like kind where the witness appeared in the character of an accomplice. We think, too, that the act which prohibits the using against any person facts stated by him

in his examination as a witness against another, furnishes some evidence, though perhaps not very strong evidence, that the legislature did not, at the passage of that act, regard the right, now contended for in behalf of the accomplice, as existing under our law. And we are of opinion that our law acknowledges no such right.

We are the better satisfied with this opinion, from the fact that the right has been established by no decision in our courts; and also from the fact that it has, as we firmly believe, never before been asserted or even heard of in our courts. Indeed, we regard *Byrd v. Commonwealth*, 2 Va. Cas. 490, as a pretty strong authority against the supposed right. We willingly admit that the point directly decided in that case was, that an accomplice is a competent witness. But the opinion declares also, that the accomplice is not exonerated from punishment; that he is not entitled to a pardon in case he succeed in convicting a fellow-prisoner, nor is he subjected to punishment in consequence of his failure; that in both cases his acquittal or conviction will depend upon the evidence adduced on his own trial. We can not believe that this broad denial of an exoneration from punishment, and of the right to pardon, would have been thus unconditionally stated, if the court had not been satisfied that the right now asserted had no existence; especially as *Rudd's Case* appears to have been before the court. It is the daily practice to receive accomplices as witnesses; in many instances they have been put upon their trial after giving evidence against their associates, and in some instances they have been convicted: yet in no one instance have counsel claimed, or the court extended to the witness, the right now asserted. How is this to be accounted for? Not from ignorance in the profession (for *Rudd's Case* has been for a long time generally known), but from the universal opinion of the bench and bar that no such right existed. And we can not readily admit that the whole profession has been, for such a length of time, in error in respect to a question which so frequently required their consideration.

It is said that policy requires that this right should be secured to accomplices. We doubt this. We readily admit that accomplices would more frequently consent to give testimony against their associates, if by doing so they would secure a pardon for themselves. But even now, when the right claimed for them is denied, they are not very often believed by juries; and we think that if the right claimed were admitted, they would

rarely be credited at all. We have not considered, and we mean to express no opinion whatever on the general power of the courts of this commonwealth to recommend persons accused to the mercy of the executive. All we mean to say is, that an accomplice has no right to demand such a recommendation, merely because he has given evidence on the part of the commonwealth, fully, candidly, and impartially.

DUNCAN, J. The majority of the court not resting its decision on the same precise grounds on which some of the judges are inclined to place it, I shall very briefly assign the grounds of my opinion.

The point on which all the questions adjourned in this case turn is, whether an accomplice, who gives testimony against his associates fairly and openly, has a right to demand from the court in which he is tried for the same offense, a recommendation to the executive for a pardon; and whether the doctrine of the English courts upon this subject, as expounded in *Rudd's Case*, 1 Leach, 115, is in force in this state. *Rudd's Case* was decided in 1775, and it was there for the first time distinctly adjudged, that an accomplice giving testimony fully and fairly against his associates in crime has an equitable right to a pardon, and that the court will recommend him to mercy, and will stay the proceedings against him to enable him to apply for a pardon. The doctrine, as settled in *Rudd's Case*, undoubtedly sprang out of the ancient law of approvement, and was merely a modification thereof. That law, as it anciently existed, had, long before the decision of *Rudd's Case*, become obsolete. Sir Matthew Hale, a century before, had stated, 2 Hale's P. C. 226, that "the admitting of approvers had long been disused." But in his time accomplices were admitted as witnesses, and it became a part of the policy of that country, in order to aid in the discovery and punishment of crimes, to encourage accomplices to give evidence against their fellows, by holding out to them the promise of a pardon if they made full and fair disclosures; and the English courts, in furtherance of this policy, so molded the common law doctrine of approvement, as to get rid of some of the objectionable features of the law as anciently practiced and understood, and at the same time to carry out the public policy. Such seems to me to have been the foundation of the decision in *Rudd's Case*.

Thus the law stood in England, and of course in the colonies, until the revolution. Soon thereafter, in 1789, the legislature of Virginia, with a knowledge that the ancient law of approve-

ment had been obsolete for more than a century, and with a knowledge of its modification by the English courts in *Rudd's Case*, passed a statute declaring that "approvers shall never be admitted in any case whatsoever." Now, as the ancient law of approvers, as technically understood, had long been obsolete, there was no necessity for the legislature to repeal it; but as *Rudd's Case* had been but recently decided, modifying the law of approvement, it is clear to my mind that the legislature had a special view to that modification of it by the English courts; and this seems to me to be the more probable, from the fact that the reason assigned by Sir Matthew Hale for the law of approvement as anciently practiced having become obsolete, applied with almost equal strength to the modification of the rule as settled in *Rudd's Case*. The reason assigned by him is, that "more mischief hath come to good men by these kinds of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders." The only difference between the ancient law of approvement and its modern modification is, that in the former the approver must confess his crime, and if he fails to effect a conviction of his confederate, he is to be punished, but if there is a conviction, then he is entitled to a pardon unconditionally. The modern doctrine does not require that the accomplice shall confess his guilt, or that his associate shall be convicted; but if he gives his testimony fully and fairly, the court is pledged to recommend, and the executive to grant, a pardon. Can there be any material difference in the degree of evil that would be likely to arise "to good men by false accusations of desperate villains?" In either case, the price held out to the accomplice for his evidence is a pardon for his own crime: in either case, he is an approver. So, I infer, the legislature supposed. And such was undoubtedly the interpretation by the courts of the country, of the statute passed in 1789, abrogating approvements; as is proved by the opinion of the elder Judge Tucker, contained in a note to 4 Tucker's Blackstone, p. 331. This able jurist states expressly, that the Virginian statute repealing the law of approvement was understood to exclude the adoption of the principle settled by the English courts in *Rudd's Case*; although he seems to regret that accomplices in this country were not placed upon the footing of accomplices in England. And I think it may be fairly inferred that the suggestion of Judge Tucker, in his note referred to, gave rise to the passage of the subsequent statute of 1811, 1 Rev. Code, c. 131, sec. 6, p. 517, in which the

legislature (for the purpose, no doubt, of holding out to accomplices an inducement to give evidence against their associates) provided that the testimony of a witness should not be used as evidence in any trial against himself.

If the law of approvement, as modified in *Rudd's Case*, were in force, then it became unnecessary to hold out to accomplices any such inducements as were held out by the statute of 1811; for the principle of *Rudd's Case* placed them in a better situation; they became entitled to a pardon under the implied faith of the government, whilst under the statute they might be tried and convicted without any claim to pardon. And we find that the general court, in *Byrd v. Commonwealth*, 2 Va. Cas. 490, decided in 1826, expressly say (although in this respect the opinion was *obiter*), that the accomplice who gives evidence against his associates is not entitled to a pardon. In New York, it is true, it has been decided, in *People v. Whipple*, 9 Cow. 707, that the law of England, as settled in *Rudd's Case*, was the law of that state; and under different circumstances that decision ought to have great weight here. But in New York there was no statute such as that passed in Virginia in 1789, abrogating approvements, nor any such as that passed in 1811. The reason assigned by the court of New York, in *People v. Whipple*, while it was in strict conformity with the principles of the common law of approvements, as modified by the English courts in *Rudd's Case*, is wholly inapplicable to this state.

I am of opinion, therefore, that although the judge who shall try the prisoner in this case may recommend him to the executive for a pardon, it is not his official duty to do so; that it is only an act of favor, which the judge, the jury, or any person may extend. I am of opinion, also, that the court ought not to continue the prisoner's case, merely to enable him to apply for a pardon.

DOUGLASS and NICHOLAS, JJ., dissented from both the foregoing opinions, and from the judgment of the court, which was as follows:

This court is of opinion, and doth decide: 1. That if a *particeps criminis*, on the trial of one of the parties to the crime, called as a witness on the part of the commonwealth, voluntarily give evidence, and fully, candidly, and impartially disclose all the circumstances attending the transaction, as well those which involve his own guilt as those which involve the guilt of others, he will yet have no right, which a court of law will recognize, to a pardon for his own guilt, and therefore he will

have no right to demand from the court a continuance of his cause, until he can have an opportunity to apply to the executive for such pardon. 2. That the court ought in this case to overrule the motion.

McKEY v. GARTH.

[2 ROBINSON, 83.]

PURCHASER AT EXECUTION SALE MUST RELY FOR TITLE ON THE WRIT ON which the sale was made. Though the officer had, at the time of the sale, other and senior writs in his hands against the defendant, the purchaser can not invoke their lien. His title is, however, good against the plaintiffs in such senior writs, and their remedy is against the sheriff.

DETINUE by McKey and Chiles for Randolph, a slave. Both parties claimed under John Nowell; the plaintiffs, through a deed of trust, dated June 4, 1823, and recorded the same day, and the defendant, Garth, under an execution sale. One *feri facias*, issued May 25, 1823, was given to the constable the same day, and was levied June 17, 1823. The slave ran away, and could not be found until the ensuing August, and too late to be sold at the time first appointed. About August 15th, the slave was found and retaken; and in October was sold under that execution and others, and purchased by Garth. Before the sale, the writ first issued ran out. It was renewed, and under this renewed writ, the sale was made. This writ was paid, and the balance of the proceeds applied to the other writs. If the title of the defendant could be referred to the first execution, and the levy thereunder, it took precedence over the plaintiffs' trust deed. If, on the other hand, it must be referred to the new execution, under which the sale was made, then it was subsequent and subordinate to plaintiffs' title. The court instructed the jury that the lien of the first *feri facias* had not been lost, and that the sale might be regarded as made under it, although the officer supposed himself to be selling under the new execution. Verdict and judgment for defendant. Plaintiffs petitioned for and were awarded a *supersedeas*.

Grattan, for the plaintiffs.

Peyton, for the defendant.

By Court, ALLEN, J. This court is of opinion that as evidence had been introduced tending to prove that a second execution had been taken out by the constable, under which, and other executions in his hands, the sale was made; however the ques-

tion might have been as to the lien of the first execution, in a controversy between the plaintiff in said execution (alleging that the second execution was taken out without his consent) and the constable, yet in this action between the purchaser at the sale and a claimant of the property, the title of the purchaser must be referred to the process under which the sale was made. That whilst on the one hand, where the officer holding two executions sells under the second, the title of the purchaser is good against the plaintiff in the first, and the remedy of the latter is against the officer, so on the other hand the purchaser at such sale can not invoke the lien of the first execution, in aid of a title acquired at a sale made under the second. The court therefore erred in instructing the jury that they must regard the sale as having been made under and by virtue of the original *f. fa.*; though they might have been satisfied, from the evidence, that the sale was in fact made under and by virtue of the second *f. fa.* and other executions in the hands of the officer.

The judgment is therefore reversed and the cause remanded, with instructions to set aside the verdict and award a new trial of the issue, on which so much of the said instruction as is herein pronounced to be erroneous is not to be repeated.

BROOKE, J., absent.

"As a general rule, execution sales are subject to all liens paramount to that under which the sale is made. Hence the plaintiff under whose writ a sale is made is usually entitled to the proceeds of the sale, to the extent of satisfying his claim. Senior lienholders are not entitled to participate in the proceeds, because their liens are unimpaired by the sale, and they may, as before, seek satisfaction out of the property sold. Where, however, the sale has the effect of transferring title free from all liens, then the senior lienholders must first be paid out of the proceeds:" Freeman on Executions, sec. 447.

MAY ET AL. v. STATE BANK OF NORTH CAROLINA.

[2 ROBINSON, 56.]

MATTERS IN ABATEMENT EXISTING PRIOR TO A SUIT must be pleaded therein in proper time. After judgment the defendant is estopped from urging them, by writ of error or otherwise.

MATTERS IN ABATEMENT ARISING PENDING A SUIT, should be brought to the attention of the court before judgment, or the defendant will be estopped from urging them as long as the judgment stands unreversed.

IN SCIRE FACIAS OR OTHER PROCEEDINGS TO REVIVE A JUDGMENT, it is not competent to allege any matters which might have been pleaded to the original action, or which existed prior to the entry of the original judgment.

DEATH OF SOLE PLAINTIFF OR DEFENDANT ABATES AN ACTION at common law; but by statute 17 Charles II., c. 8, the death of either party after verdict, and before judgment, could not be alleged for error, and the judgment was entered as though the party were alive, but must have been revived by *scire facias* before execution could regularly issue.

DEATH OF SOLE PLAINTIFF AFTER JUDGMENT renders a *scire facias* necessary to the issuing of execution.

IF CORPORATION EXPIRES AFTER JUDGMENT, execution can no longer issue in its name.

THOUGH THE CHARTER OF A CORPORATION EXPIRED BEFORE JUDGMENT IN ITS FAVOR, no execution can issue on such judgment, and the defendant is not estopped, on a motion to quash the execution, from showing the expiration of such charter before judgment. *Per* Allen and Brooke, JJ.; Baldwin, J., dissenting, and Stanard, J., not concurring in this part of the decision.

MOTION for judgment on a forthcoming bond. Counter motion to quash the bond and the execution on which it was based. This execution issued on a judgment in favor of the State Bank of North Carolina. The defendants now showed that the charter of the bank had expired January 1, 1835. The original judgment in the circuit court of Mecklenburg county was entered October 31, 1831; and appeal was taken, and judgment given, as appears 8 Leigh, 238. In conformity with the judgment of the court of appeals, final judgment was entered in the circuit court, May 12, 1837. On this, execution issued, and was levied on the property of May, who executed a forthcoming bond. He now sought to have the bond and execution quashed, on the ground that the corporation had become extinct by the expiration of its charter, and because his two co-defendants had died before the rendition of the judgment of the court of appeals. The execution had been issued for the benefit of E. B. Hicks, to whom an assignment of judgment had been made December 6, 1831. The motion to quash was denied, and judgment was given, awarding execution on the forthcoming bond. Defendant petitioned for and was awarded a *supersedeas*.

Macfarland, for the plaintiffs in error.

Rhodes, for the defendants in error.

In the court of appeals, Baldwin, J., delivered a very lengthy opinion in favor of affirming the judgment of the lower court. He held: 1. That matter in abatement existing prior to the institution of an action must be pleaded therein, or the defendant would be estopped from afterwards asserting it: 1 Archb. Pr. 304; *Crawford v. Satchwell*, 2 Stra. 1218; *Wortley v. Rayner*, 2 Doug. 637; 2. That upon the death of a party *pendente lite*, if a judg-

ment be afterwards entered, it is valid, until reversed for error of law or of fact: *Jourden v. Denny*, 2 Bulst. 241; and can not be assailed in any collateral proceedings for its enforcement: 1 Roll. Abr. 742; 1 Rob. Pr. 585; *McFarland v. Irwin*, 8 Johns. 78; *West v. Sutton*, 2 Ld. Raym. 853; 3. That the extinction of the corporation having occurred prior to the final judgment, ought to have been suggested prior to such judgment, although it happened after verdict; and, therefore, that the defendant was now estopped from avoiding the effect of the judgment. The other members of the court were for reversing the judgment, and gave opinions as follows:

ALLEN, J. The authorities bearing on the questions presented by this case have been fully reviewed by Judge Baldwin. They clearly establish, that where matter in abatement existed prior to the suit, advantage must be taken of it by plea in proper time, and that after judgment the party is estopped, and can not avail himself of it by a writ of error: and that where such matter occurs pending the suit, if not suggested or brought to the notice of the court before judgment, though a writ of error *coram nobis* in some cases may be prosecuted, the judgment until reversed estops the party from alleging the fact. And as a consequence from these principles, in all proceedings based upon the judgment and tending to enforce it, the party is concluded from availing himself of this error in the judgment. Thus the *scire facias* to revive is a mere continuance of the proceedings, and it is not competent for the heir or personal representative of the original defendant to set up his death before judgment, in order to defeat the plaintiff. The judgment unreversed has established the fact to be otherwise. And hence the well-settled rule, that the defendant can not plead any matter to the *scire facias* on a judgment, which he might have pleaded to the original action, or which existed prior to the judgment. So in a *scire facias* upon a recognizance of bail, the bail can not require evidence of that which was necessary to entitle the plaintiff to recover in the original action, because the *scire facias* is a continuance of the proceedings. That is the amount of the decision in *Henriques v. The Dutch West India Co.*, 2 Ld. Raym. 1532. It was a proceeding on the recognizance of bail, and the plaintiffs were not required to produce proof of their incorporation; but the reporter says he was informed by Lord King, before whom the original action was tried, that on the trial of that case the proof was required. So with regard to alienage and coverture, the disability is personal; but judgment having

passed, the defendant is concluded; and the parties continuing to exist, the execution follows the judgment. These principles, however, respect the validity and effect of the judgment, in a proceeding to enforce it, and based upon it: but their application to the question now under consideration is not so distinctly perceived. That respects the regularity of the process. If the state of facts existing at the time the process issued be such as to render it unlawful, the process is void. And this irregularity may frequently appear by extrinsic circumstances, as where the execution issues against a defendant who is dead, the death does not appear on the face of the writ, but appears by evidence *aliunde*: *Woodcock v. Bennet*, 1 Cow. 739 [13 Am. Dec. 568].

It is argued, that to impeach the regularity of the execution, in a case like this, is to impeach the judgment for the purpose of execution; and that as there can be no revival, if it be not good for that purpose, it is good for nothing in the cause. This might be conceded, and yet not affect the question. If by the common law the debts of a corporation, either to or from it, are extinguished by its dissolution, as laid down in *Rider v. The Union Factory*, 7 Leigh, 156 [30 Am. Dec. 495], the fact that the debt is due by judgment can not operate to save it. And if, by a renewal of its charter, it is restored to all its rights, and liable for all its obligations, 2 Kyd on Corp. 516, it may, when so renewed, revive and obtain the benefit of the judgment. If the personalty of an expired corporation goes to the commonwealth, or if there has been a valid assignment before the dissolution, in either case the judgment may be enforced, if not at law, by a proceeding in equity. And by whatever mode enforced, the judgment establishes conclusively the validity of the debt and the right of the party to recover, at the time of its rendition. With as much force it might be argued, that as at common law, and before a *scire facias* was given to revive after the year and day, there could be no revival, the judgment was of no validity. And yet in such case the judgment, in an action of debt upon it, can not be assailed for any matter which might have been pleaded to the original action.

At common law, the death of a sole plaintiff or defendant abated the suit: 2 Tidd's Pr. 1168. The statute of 17 Car. II., c. 8, provided that the death of either party between verdict and judgment should not be alleged for error. Under this statute, judgment is entered for or against the party as though he were alive: *Weston v. James*, 1 Salk. 42. But there must be a *scire facias* to revive it before execution: *Earl v. Brown*, 1 Wils. 802.

In the case just cited, the plaintiff died after verdict and before judgment: judgment was entered and execution taken out, without any *scire facias* sued out by the plaintiff's representative: and the whole court held, that though by the 17 Car. II., c. 8, the judgment was regularly entered, yet the *fi. fa.* issued irregularly, for there ought to have been a *scire facias*. That is a much stronger case than the one under consideration; for the death of the plaintiff (a natural person) does not extinguish the debt. But the *scire facias* in that case is supposed to be rendered necessary by the statute of 17 Car. II., because the judgment is general for or against the party as if he were living at the time it was entered, and the *scire facias* must follow the judgment, and recite it as if it had been entered in his life-time. If, before the statute, a judgment were entered against or for a dead man, the same result would follow: the judgment, until reversed, would be evidence that the party was living; the *scire facias* would so recite it; and the defendant would be estopped on the *scire facias* from showing the contrary. That being the case, in what sense can it be contended that the statute rendered the *scire facias* necessary? Where it authorizes a judgment to be entered as though the party were living, the same effect should be given to it as where the judgment was so entered erroneously. And if in the latter case an execution might have been taken out in the name of the parties on the record, *a fortiori* would such an execution have been regular where the judgment itself was legalized. The *scire facias* could only have been rendered necessary, because the common law required it, and the statute, whilst curing the error in the judgment, left the parties to their common law remedies to enforce it. And the case referred to is a decisive authority, that, by the common law, the judgment must be revived in the name of the proper representative. No case has been adduced establishing a contrary position.

But we have cases without number, deciding that if the plaintiff dies after judgment, there can not be execution before a *scire facias* in the name of the representative: Com. Dig., tit. Pleader, 3 L 1; 1 Roll. Abr. 900, pl. 15, 20. But if the plaintiff dies after execution, in that case the sheriff may go on and levy the money, and if there be no executor or administrator, the money is to be brought into court: *Thoroughgood's Case*, Noy, 73. As between the parties, the execution has relation to its *teste*: Tidd's Pr. 915; and if tested before the party's death, is regular, though issued afterwards: *Cleve v. Veer*, Oro. Car.

459. But if tested after the plaintiff's death, it is irregular: *Heapy v. Parris*, 6 T. R. 368. How would this question so frequently have arisen, if, by the common law, execution might be sued out by or against a party where the death occurred before judgment? There could be no good reason for a distinction, whether the party died before or after the judgment, so far as the regularity of the process was involved. The rule which has always prevailed is laid down in *Pennoir v. Brace*, 1 Salk. 319, that where a new person is to be better or worse by the execution, there must be a *scire facias*, because he is a stranger, to make him a party to the judgment; as in the case of an executor or administrator. And hence the necessity of a *scire facias* in all cases of death before execution. Here the corporation is extinct: that it can not have benefit by the execution is evident: and whoever is to be the better for it, should in some form be brought into the case. If the forms of proceeding at law interpose difficulties, the party may have redress in equity.

If then there is no authority for the position assumed, that in case of death before judgment, a *scire facias* was not essential, and execution might be sued out in the names of the parties on the record; but, on the contrary, the common law did, whenever there was such change of parties, require a *scire facias*; the whole argument derived from the doctrine of estoppel and the adjudication of the fact, falls to the ground. The estoppel applies only where the attempt is made to impeach the validity of the judgment for that cause. In such case the party is precluded by the judgment from denying the fact. And that is the effect of the decision in *Lambert v. Cameret*, Comb. 446. The proceeding there was to reverse the judgment by writ of error *coram vobis*. The plaintiff having died before action brought, the defendant, by pleading to the action, waived the objection and admitted him to be alive. If therefore the plea to the assignment of error had simply averred that the plaintiff in the original action was alive at the time the action was brought, and relied upon the record, the plaintiff in error would have been estopped. But even that case proves that the technical estoppel must be pleaded in such way as to preclude the party from showing the contrary. The defendant in error averred by his plea the continued existence of the party to the time of the judgment; and this let the plaintiff in error loose from the estoppel. He was permitted to show by evidence that the party was dead at a time when, by the record, he was deemed to be alive; and by so doing, to avoid the judgment. But in a

case where the judgment is not impeached; where the motion raises merely the question, whether the process is irregular in itself, or in the mode of issuing it (a question to be determined with reference to the state of facts existing at the time the process issued), it would be carrying the doctrine of estoppel, and the intendment of an adjudication, to a great length, if the defendant is to be precluded from showing that at that instant of time no party was in existence capable of suing out process, because such existing disability is a consequence of another fact, which occurred before final judgment.

The case of *The Bank of Alexandria v. Patton*, 1 Rob. 499, is supposed to have some bearing on this question. In that decision I concurred, for the reasons assigned in the opinion delivered, and also because I felt satisfied that in this court there was no necessity for a revivor in any case; that though it might be convenient, when a death occurred, to apprise the parties interested of the pendency of an appeal, there was no absolute necessity for it, and it was the duty of this court, whenever justice required it, to determine the questions appearing on the record, and leave the parties to proceed thereafter as their interests might require and the law permit. The court held in that case, that before the act of 1806, appeals and writs of error did not abate by the death of either party, but his representative or the other party might revive by *scire facias*; and that even this practice did not require such revivor at the time of the judgment or decree of this court, if the death had occurred subsequent to the argument. The difficulty of proceeding in error unless there were existing parties, legal or natural, at the time of the hearing and judgment, was therefore not insuperable. When, as in that case, there was a suggestion that rights might be compromised unless the decree, if erroneous, were removed out of the way, it was competent for the court to act on the decree in the name of the parties on the record. The power was considered essential to prevent injustice: and the case was put, of a decree or judgment of the court below in favor of the corporation against the appellant, and a subsequent dissolution of the corporation; when, if the appeal must necessarily be abated, the recovery would be left in force, and the appellant liable to be charged with it at the suit of an assignee. The court in the present case, in rendering judgment on the special verdict, decided upon the facts as there presented, and with reference to the time when presented. The correctness of the judgment of the inferior court was the matter for consideration: and on the

facts as presented to that court, and passed upon by it, no impediment to a final judgment existed. The corporation was then in being, and entitled to recover. And this court, by its reversal, and the entry of such judgment as that court should have given, adjudicated that fact and nothing more. Had the dissolution of the corporation been suggested here, and rights might have been compromised on one side or the other by abating the appeal, this court, under the authority of *The Bank of Alexandria v. Patton etc.*, would have refused to abate, and proceeded to render the judgment it did. It passed no judgment upon matters which supervened after the special verdict, and the judgment on it by the court below. Its action was confined to the correction of the error in that judgment, as of the time it was pronounced, without considering or deciding what would be the effect of any subsequent events upon the rights of the parties. The charter might have been renewed after the appeal; but this would be matter extrinsic to the record. In such case the appeal ought not to be abated. But if the rights of the parties are to be considered as determined as of the time of pronouncing the judgment in the appellate court, the court must, by abating the appeal, decide that the corporation has expired, or, if it notices the extrinsic evidence, the judgment would be rendered not upon the record as it came from the court below, but upon that in connection with matter for the first time exhibited in this court.

The argument pressed upon us as to the merits of the case, and the inconvenience, is not entitled to much weight if the law is obligatory. But in truth, where is the inconvenience or hardship complained of? If the corporation had expired by efflux of time after judgment, I presume there could be no pretense that an execution could issue in its name; for in that case, this technical doctrine of estoppel would not apply. There would be no judgment determining against the fact, that that was existing which had ceased to exist. Yet in such case the judgment would remain, as in this, entitled to all the respect of a judgment, whenever enforced in a proper way by the party entitled to enforce it. But on the other hand, serious inconvenience, if not gross injustice, might and probably would flow from establishing the principle contended for. Is any man who can succeed in inducing the clerk to issue an execution on a judgment standing in the name of an expired corporation, to be permitted to enforce payment? If the sheriff collects the money, to whom is he to pay it? It is suggested that there is

an assignee: but how is his right to be determined on an *ex parte* proceeding, without notice to any party interested in controverting his claim if erroneous? The debtor has an interest in seeing that the money he owes is paid into the proper hand. By requiring the party (whoever he may be) claiming to be entitled to the benefit of the judgment, to enforce it in the proper mode, the injustice which may be committed by permitting execution to issue in the name of the extinct corporation, is guarded against, and the rights of all secured.

It seems to me that the court should have overruled the motion for a judgment on the forthcoming bond, and quashed the execution.

STANARD, J. It is not questioned that if a corporation becomes extinct by the expiration of the term of its corporate existence, pending a suit at law for a corporate demand, and that fact be brought regularly under the judicial cognizance of the court in which the suit is pending, the action must terminate. It is equally free from doubt, that if, after judgment in favor of a corporation, the corporation becomes extinct by the expiration of the term of existence granted by the charter of incorporation, no execution on such judgment can regularly be sued out in the name of the corporation, and if one be issued, it is liable to be quashed on showing the fact of the extinction of the corporation before the emanation of the execution. On the other hand, I do not question that if an original judgment be rendered in favor of a corporation, as it could not regularly be rendered unless the existence of the corporation continued, the necessary intendment from the rendition of it is, that the then continued existence of the corporation was either proved or admitted; and if execution be sued on the judgment, the defendant being by this intendment estopped to deny the existence at the time of the judgment, would not, on a motion to quash the execution, be admitted to controvert this intendment, and proof on such motion of the extinction of the corporation before judgment, would be inadmissible or unavailing.

Assuming the foregoing propositions as unquestioned or unquestionable, the inquiry is, by which of them should the case in judgment be ruled? The case that the record presents is that of a corporation plaintiff existing at the time of the original judgment in the court below, and at that time, according to the judgment of the court of appeals, entitled to judgment against the defendants, but whose charter expired pending the proceedings and before the final judgment in error: and this expiration

of its corporate existence is the matter alleged for quashing the execution which issued on that judgment. If the expiration of the charter of incorporation pending the proceedings in error, and the subsequent judgment in error notwithstanding that expiration, be properly assimilated to an original judgment after the expiration of the charter, then, according to the second assumed proposition, the judgment precludes the inquiry into the existence of the corporation at the time of its rendition; and therefore forbids or nullifies the proof of the non-existence of the corporation at the time of the judgment in error, and consequently at any antecedent time. The material question then is, can this assimilation be properly made?

The principle on which the second proposition rests is, that the expiration of the charter before original judgment was a fact on which the defendant might have protected himself from the judgment, and if properly brought to the judicial cognizance of the court, would have denied to the court judicial capacity not only to render the judgment, but to proceed in the cause; and the legal intendment is, that the fact of the continued existence of the corporation was conceded or proved. Is such the predicament of the case in error? Does the judgment in error necessarily import that the parties are existing at the time of its rendition, so as to create an estoppel to the denial of that fact, in proceedings in execution of the judgment? This inquiry must be answered in the negative. It has been the constant practice of this court, where natural persons are the litigant parties, to proceed to judgment as though such persons were living, if the death occurs between the argument of the case and the judgment, though the judgment be rendered months or even years after the death: and on the return of such a judgment to the court below, it could hardly be contended that the successful party could proceed to have it executed without process of revivor in the court below.

In the case of a corporation whose existence may have terminated pending appeal or writ of error, and to which there is no legal succession nor can be a legal representative, but whose rights, at least in equity, may have passed to others by assignment for value during its existence, the appellate proceedings are continued to judgment or decree in the appellate court, irrespective of the fact that the corporate existence has terminated. Such was the decision of this court in the case of *The Bank of Alexandria v. Patton etc.*, 1 Rob. (Va.) 499. According to that decision, had the attempt been made, when this case was in the

court of appeals, to arrest further proceedings in error, and thereby intercept the judgment that was rendered, on the ground that the charter of the corporation had expired, it would have been fruitless. The court would, notwithstanding such objection, have proceeded to a decision, and would have rendered such judgment as the court below ought to have rendered. As the expiration of the charter would not have prevented the rendition of the judgment, there can not be a legal intendment of the then continued existence of the corporation from the rendition of the judgment, as in the case of an original judgment. The judgment in error, in respect to this question, has relation to the time of the judgment of the court below, being the judgment that ought to have been rendered by that court; and execution on that judgment, if sued out in the name of a party who may have ceased to exist pending the appeal or writ of error, is as liable to be objected to on that ground, as it would be if the judgment on which it issued had been rendered by the court below when its original judgment was rendered. There can be no estoppel to the allegation and proof of the expiration of the charter and extinction of the corporation, resulting from a judgment which, so far from implying either concession or proof of its existence at the time of its actual rendition, would have been rendered though there had been the allegation and proof that at that time its existence had terminated.

The evidence that was offered to show that the corporation had ceased to exist at the time the execution issued in its name, was, I think, *prima facie* proof thereof, and, uncontrolled by other proof, ascertained that fact: and that being ascertained, it established that the execution on which the forthcoming bond was taken issued irregularly, and the court ought to have overruled the motion for award of execution on the forthcoming bond, and to have sustained the motion to quash that execution and the bond taken under it. This would have left the judgment rendered by this court to the fate to which the extinction of the corporation consigned it. If any party, by virtue of a transfer from the corporation during its existence, was beneficially entitled to the avails of the judgment or the subject involved in the controversy, though that party could not have a legal remedy by suing out execution in the name of a nonentity, an expired corporation, I do not doubt that his equitable title would be protected by a court of equity, and his claim to the avails of the judgment enforced in that forum against the party chargeable.

BROOKE, J. I think the case of *Rider v. The Union Factory*, 7 Leigh, 154 [30 Am. Dec. 495], ought to govern this case, as I thought it ought to have governed the case of *The Bank of Alexandria v. Patton etc.*, 1 Rob. (Va.) 499. I differed from the rest of the court in the last mentioned case, because I could not see that an *ex parte* exhibition of a deed of assignment by the bank before the expiration of its charter (not to be found in the record, and not noticed in the pleadings), could be made the ground of decision in this court. The charter of the bank having expired, the assignment could not be contested here by that institution, nor by the defendants, who had no notice of it in the record. Had the bill been in the name of the assignees instead of the bank, that might have been a ground for relief though the charter had expired. In the present case, I can not distinguish between the expiration of the charter of the state bank of North Carolina after the judgment of this court, and before it. In the former event, there could be no doubt that the motion on the forthcoming bond would be overruled, and the execution and bond quashed. Nor can I understand how the supposed estoppel of the judgment is to be availed of. It is said by the court in *Rider v. The Union Factory*, before referred to, that upon the expiration of its charter, a corporation can neither hold property, nor be responsible for any of its acts in the corporate character. It is a nonentity. As such, it can neither plead nor be impleaded. How then could the bank in the present case avail itself of the estoppel of the judgment? Where a natural person, party to a suit, has died before judgment, his representative, in a case like the one before us, might insist on the estoppel of the judgment: and all the cases that have been cited are of that character. I believe no case can be found, in which the court has applied the estoppel of a judgment so as to enforce the judgment, on behalf of a dead party having no representative before the court, against the defendant. In any view of the case, I think the motion on the forthcoming bond ought to have been abated, and the execution and bond quashed; but without costs.

Judgment reversed, and execution and forthcoming bond quashed.

CABELL, P., absent.

"If a corporation become extinct by expiration of its charter, or by decree of forfeiture pending a suit at law for a corporate demand, and that fact be brought regularly before the court, the action must terminate; and an at-

tachment made in such suit is of course dissolved, and, if even after judgment in favor of a corporation the corporation become extinct, no execution can issue regularly in the name of the corporation, and if one be sued out it may be quashed on showing that the corporation had become extinct before it was sued out. The necessary intendment from a judgment in favor of a corporation is, that it was proved or admitted that the corporation was in existence at the time of the judgment; and if execution be sued out, the defendant in execution will be estopped from proving that the charter had expired previous to the judgment." Angell & Ames on Corp., sec. 195. In support of these several propositions the authors cite the principal case. Upon the last proposition, they entirely misapprehended the decision, and mistook the dissenting opinion of Judge Baldwin for the opinion of the court. It is difficult to resist the reasoning of Judge Baldwin. The judgment would seem to be a vain judicial act, if it does not reach the dignity of a determination that there is a plaintiff, and that he is entitled to recover; and it seems strange that the defendants thereafter on motion should be permitted to avoid the judgment by proving that prior to the judgment there ceased to be any plaintiff and any right of recovery. The conclusion reached in the principal case was probably defensible on the grounds taken by Judge Stanard, viz., that the original judgment was entered in 1831, in the circuit court, that the expiration of the charter was long subsequent and might be urged as a ground for quashing the execution without making any proofs inconsistent with the facts essential to the maintenance of the judgment.

The rigid doctrine of the common law was that the dissolution of a corporation totally extinguished all debts due to or from it, so far at least as any right of action thereon was concerned: Ang. & Ames on Corp., sec. 779. Hence the corporation could not, after such dissolution, either sue or be sued: *Saltmarsh v. P. & M. Bank*, 14 Ala. 668; S. C., 17 Id. 761; *Bank of Louisiana v. Wilson*, 19 La. Ann. 1. And all pending suits by or against it were abated if the fact of dissolution was brought seasonably to the notice of the court: *Paschall v. Whitsett*, 11 Ala. 472; *Farmers' etc. Bank v. Little*, 8 Watts & S. 207; *Greeley v. Smith*, 3 Story, 657; *First National Bank of Selma v. Colby*, 21 Wall. 609. Though the contrary was held in *Lindell v. Benton*, 6 Mo. 361, where it was decided that legal proceedings regularly commenced against a corporation were not affected by the subsequent expiration of its charter, and on that and other grounds, a motion of garnishees of a defendant corporation for their discharge because the charter of the corporation had expired after the suit was commenced, was denied. So under the Missouri statute: *Kansas City Hotel Company v. Sauer*, 65 Id. 279. The doctrine that an action against a corporation, dissolved by judgment of forfeiture *pendente lite*, can not be further prosecuted, is thus forcibly stated by Field, J., in *First National Bank of Selma v. Colby*, 21 Wall. 609: "With the forfeiture of its rights, privileges, and franchises, the corporation was necessarily dissolved, as the decree has adjudged. Its existence as a legal entity was thereupon ended; it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced, than judgment could be rendered against a dead man dying *pendente lite*." In that case the receiver of the defunct corporation was permitted, without objection, to make proof of the fact of dissolution on a motion to dissolve an attachment against the corporation. If there is a judgment of forfeiture after a judgment against the corporation in the court below, a writ of error prosecuted in its name will be quashed: *Miami Exporting Co. v. Gano*, 13 Ohio, 269.

So, where after judgment against a corporation, its charter was vacated and annulled by a surrender thereof, and by a transfer of its rights and privileges

to another corporation, it was held that *scire facias* would not lie on such judgment, "for," as the court said, "there is no pretense to say that a *scire facias* can be maintained and a judgment had thereon, against a dead corporation any more than against a dead man:" *Mumma v. Potomac Co.*, 8 Pet. 281. Where, however, judgment is rendered for or against a corporation after its dissolution, but without that fact having been regularly brought to the notice of the court, a question of greater difficulty is presented. No case except that of *May v. State Bank*, has come under our notice respecting the validity of such a judgment in favor of a defunct corporation. There are, however, several cases in which the validity of a judgment against a dissolved corporation has been the subject of judicial determination: *Morawetz on Priv. Corp.*, sec. 660, and cases cited. In *Merrill v. Suffolk Bank*, 31 Me. 57, and *Rankin v. Sherwood*, 33 Id. 509, it was determined that where an action was commenced and judgment rendered against a corporation after its charter had been revoked, the judgment was erroneous and could be reversed on writ of error brought by a member of the corporation whose property had been levied on under an execution issued on the judgment.

But there are other cases holding a judgment rendered against a corporation after dissolution in an action previously commenced to be not merely erroneous, but absolutely void: *Thornton v. Marginal Freight Railway*, 123 Mass. 32; *McCulloch v. Norwood*, 58 N. Y. 562; *Sturges v. Vanderbilt*, 73 Id. 384. In *Thornton v. Marginal Freight Railway Co.*, *supra*, the plaintiff filed a bill against the Marginal Freight Railway Co. and the Union Freight Railway Co., to subject to payment of a judgment recovered by him against the former company, a certain claim held by it against the Union Freight Railway Company. The bill showed that the charter of the Marginal Freight Railway Company was repealed in 1872, allowing three years for the prosecution of claims against it, and that the plaintiff's judgment was recovered after the expiration of the three years. The defendants demurred on the ground that the judgment was a nullity, and the court so held. In *McCulloch v. Norwood*, 58 N. Y. 562, the plaintiff claimed from the defendant, as receiver of a certain insurance company, payment of a judgment recovered in Ohio against the company. It appeared that while the plaintiff's action was pending, the corporation was dissolved by a judgment of forfeiture by the supreme court of New York, and a receiver appointed. The fact of dissolution was in no way brought to the notice of the plaintiff, and the corporation continued to be represented by its former attorneys in the action pending in Ohio, until the final trial, when the said attorneys announced the dissolution in open court, and stated that they had no authority further to represent the company. The court, however, proceeded to give judgment for the plaintiff, without making any order for the continuance of the action, as provided by the New York act of 1832, assuming the law to be the same in Ohio as in New York. This judgment was held a nullity, reversing the decision of the court below in 4 Jones & S. 180. In *Sturges v. Vanderbilt*, 73 N. Y. 384, the action was brought to compel the defendants to apply certain moneys received by them, as stockholders, out of the assets of a certain corporation, to the payment of a judgment recovered by the plaintiff against the corporation; but it appearing that the charter of the company expired by its own limitation while the action was pending and before judgment, and that no order was made for the continuance of the action under the act of 1832, the judgment was declared absolutely void.

On the other hand, in *Muscatine Turn Verein v. Funck*, 18 Iowa, 469, the court refused to set aside a decree of foreclosure rendered against a corporation after its dissolution by vote of its members in accordance with a provi-

sion in its charter. The foreclosure suit was commenced after the members had resolved to declare the corporation dissolved, service being had upon its last presiding officer. After decree and sale and some other proceedings a bill was filed in the name of the corporation to set aside the decree, on the ground, among others, that the court had no jurisdiction to render it. The court dismissed the bill, holding: 1. That the voluntary dissolution of the corporation did not, under the Iowa statute, take away the power to act in closing up its affairs, nor the right of a creditor to be relieved from the inequitable consequences of the dissolution; 2. That it would be presumed that the court rendering the decree pronounced the service sufficient, and that its subsequent determination, though it might be erroneous, could not be void; and, 3. That if the corporation was dead at the time of service and decree, it had never been revived, and could not therefore have any standing in court to impeach the decree. Where a foreign corporation is dissolved by a judgment of forfeiture in its own state, a court of another state in which a suit is pending against the corporation, may, notwithstanding such dissolution, proceed to judgment, unless it appears that the corporation is totally extinct: *Hunt v. Columbian Ins. Co.*, 55 Me. 290.

It is declared in *Angell & Ames on Corp.*, sec. 779 a, that the rule of the common law as to the effect of dissolution of a corporation upon its property and debts has become "obsolete and odious" by legislation in the various states and by the application of the equitable doctrine holding the corporate property a trust fund for the payment of debts. In accordance with this doctrine the corporate obligations are not extinguished by surrender of its charter, so far as the property is concerned, but may be enforced against any such property which has not passed into the hands of *bona fide* purchasers: *City Ins. Co. v. Commercial Bank*, 68 Ill. 348. In consonance with this idea it is held that the dissolution of a corporation does not affect pending proceedings *in rem* against it, and therefore does not oust a court of bankruptcy of jurisdiction previously obtained over the property of the corporation: *Platt v. Archer*, 9 Blatchf. 559.

PATRICK v. RUFFNERS.

[2 ROBINSON, 209.]

FERRY IS AN INCORPOREAL HEREDITAMENT acquired from the public, either by special act of the legislature, or by some other competent authority, under the provisions of a general law. It includes the exclusive privilege of transportation, for tolls, across a watercourse, and also the use, for that purpose, of the respective landings and their outlets.

USE OF THE LANDINGS AND THEIR OUTLETS is a part of the ferry franchise.

COMPLAINT IN ACTION FOR DISTURBANCE OF FERRY need not set forth the means by which the ferry was legally established, nor the derivation of plaintiff's title thereto.

COMPLAINT IN ACTION FOR DISTURBANCE OF FERRY, BY INJURING THE LANDINGS AND THEIR OUTLETS, need not allege directly that plaintiff was possessed of them, or was owner of the soil, if it shows that they were used as appurtenant to the ferry.

FERRY BEING ESTABLISHED IN A PUBLIC ROAD, the grantee is entitled to the use of the road for landings and outlets, appurtenant to the ferry. ALLEN, J., dissenting.

VALIDITY OF FERRY FRANCHISE can not be questioned collaterally, unless by parties who can show a right paramount to that granted by the public. **OWNER OF FERRY MAY MAINTAIN AN ACTION FOR THE DISTURBANCE** thereof against persons who, by obstructions in the river, cause injuries mediate or immediate to the landings, thereby diminishing the profits of the ferry, and subjecting the owner to increased labor and expense in the use of his franchise.

COMPLAINT FOR DISTURBING THE ENJOYMENT OF A FERRY, sufficiency of, discussed by the judges.

TRESPASS on the case. The declaration was demurred to generally, the demurrer sustained, and judgment given for defendants. Plaintiff petitioned for and was awarded a *supersedeas*. The substance of the complaint is sufficiently stated in the opinions.

B. H. Smith, for the plaintiff.

No appearance for the defendant.

BALDWIN, J. The gravamen of this action is the disturbance of the plaintiff's franchise. A ferry is an incorporeal hereditament acquired from the public, and, in this country, granted by a special act of the legislature, or by some other competent authority under the provisions of a general law. It comprises not merely the exclusive privilege of transportation, for tolls, across a stream or other body of water, but also the use for that purpose of the respective landings, with the outlets therefrom; without which the grant would be wholly nugatory. It is usually established upon some public road, of which it is a connecting link; but the landings may be altogether private property, in which case the grant supposes that they belong to the grantee, or that he is entitled to the use thereof for the purposes of the ferry. In either case, the use of the landings and outlets is a part of the franchise, so far as the public is concerned. If they constitute portions of the highway, as they do where the ferry is on a duly established road, then the grant is a delegation of the use of the public easement, so far as is necessary for the purposes of the ferry; and no individual can have a right to question it. If they do not constitute portions of a highway, the question whether the grantee is the owner of the soil, or has acquired a right to use it for the purposes of the ferry, can only be made under an adverse claim of title. The grant of the franchise from the public, and the use of the ferry with its appurtenant landings and outlets, is all that need be established in an action by the grantee against a wrong-doer who disturbs his enjoyment. Nor is it material

whether the disturbance is by invading the plaintiff's right to the exclusive transportation and tolls, or by obstructing or impairing his navigation, or by destroying or injuring the landings and outlets; *quacunqve via*, the grievance is substantially the same, and consists not in the damage done to an estate, or interest in the water or soil, but to the value or profits of the franchise.

The declaration in this case alleges, with sufficient certainty, the plaintiff's right to the ferry, and to the use of the appurtenant ways and landings; and sets forth precisely the grievance complained of. The first count avers, in substance, that he was possessed of a legally established ferry; that there were good and convenient roads, ways, and landings for the use of the same; that there was, and of right ought to have been, a free and uninterrupted passage for the water flowing in and down the river, so as not to affect or injure the landings, ways, or roads at the ferry. The grievance is, that the defendants wrongfully placed obstructions in the river near the ferry and landings, by which the current of the stream was checked and diverted, and thrown from and upon the landings and outlets, in modes particularly described; thereby occasioning the plaintiff great labor and expense, destroying or injuring the roads and landings, rendering the embarkation and debarkation difficult, and preventing the transportation of persons and property. The second count is the same, except that, instead of alleging a possession of the ferry by the plaintiff, it avers his right to the reversion thereof, expectant upon the term of his tenant, in whom the possession, use, and enjoyment are charged to be; and that the grievance complained of is to the prejudice of the plaintiff's reversionary estate.

What more, in relation to his right, was it incumbent upon the plaintiff to allege? It was surely unnecessary to set forth the means by which the ferry was legally established, or the derivation of his title thereto. No averment of title on his part was at all necessary in the first count, founded upon his own possession: 1 Chit. Pl. 413, 414; and in the second, a general averment of his right to the reversion expectant upon the determination of his tenant's term, was all-sufficient: *Id.* 415. The declaration shows that the landings, ways, and roads at the ferry were used for the purposes thereof, and so were appurtenant thereto; and that of right they ought to have remained unaffected and unimpaired by a diversion or obstruction of the water. The plaintiff's action is not for a common nuisance. The

general navigation of the stream, and the travel on the road, regarded merely as such, may not have been in any wise impaired or impeded by the wrongful act of the defendants; and if they were, the reason why an individual can not maintain an action for a common nuisance, without showing special damage, has no application to a case like this. The reason mainly is, that the damage being common to all the citizens of the commonwealth, no one can assign his particular proportion of it. Here, no such difficulty exists. It is true, if the road was a highway, the plaintiff and all the other citizens of the commonwealth had a right to pass along the road and across the ferry; but the plaintiff alone was entitled to the exclusive privileges of transportation and tolls, conferred by the grant of the franchise. These, and the incidental means of enjoying them, were possessed by him only, and no one else has a right to complain, of the particular grievance alleged, namely the disturbance of his franchise, by which he alone has sustained damage, in the diminution of his profits. In truth, according to the case made by the declaration, the public at large could in no wise be prejudiced, but by the inability to cross the ferry safely and conveniently; and that resulted merely from the disturbance of the plaintiff's franchise; an immediate injury to him, for which he is entitled to redress.

There could be nothing in the objection that the plaintiff does not directly allege that he was possessed of the landings and outlets. By showing the use of them to be appurtenant to the ferry, he has asserted all the possession of which the subject was susceptible. If they were private property, that can avail the defendants nothing, unless they can prove that it belonged to them; which it will be competent for them to do on the trial of the cause. The plaintiff need not assert or prove that he was the owner of the soil: the use for the purposes of the ferry is enough against a wrong-doer; and is even enough against the owner, if the right to that use has been acquired from him, or from those under whom he claims title; which is a mere matter of evidence to repel the *prima facie* right apparent from the enjoyment. It is true that in *Saville*, p. 11, pl. 29, it is asserted that in every ferry the land on both sides of the water ought to belong to the owner of the ferry, for otherwise he could not land on the other side. But this idea is repudiated in *Peter v. Kendal etc.*, 6 Barn. & Cress. 703, in which it was held that he need not have property in the soil on either side. And this doctrine is no invasion of the right of private property; for, while the grant of the franchise takes away the defense of exclusive

ownership in another, it does not prevent the defendant from asserting it in himself. If the plaintiff were even the proprietor of the soil, it would not only be unnecessary, but perhaps improper, to aver it in the declaration; inasmuch as the gravamen of the action is not an injury to the soil, but to the incorporeal right of using it as an incident of the franchise.

So, too, if the landings and outlets were parts of an established highway, the use of them for the purposes of the ferry is all the possession which the plaintiff could assert or prove; and thus, in that aspect of the case, the only question really is whether, when a ferry is lawfully established on a public road, the grantee is entitled to the use of it for landings and outlets, as appurtenant to the ferry. And upon that question I can have no doubt, even as against the owner of the soil over which the road, as a public easement, passes; though the question is not presented by the declaration, and can only arise upon the proofs. The ownership of the soil, it is true, is subject only to the public easement; but the delegation by the public of the use of that easement to the grantee of the franchise, for the purposes of exclusive transportation and tolls, is a part of the grant, and not at all incompatible with the reserved rights of the owner of the soil; who can no more obstruct the travel and carriage across than to and from the water; and if he does so by any means, it is at one and the same time a grievance to the grantee and the public, for which each is entitled to the appropriate remedy. When the ferry is a connecting link of a public highway, to say that the grantee has no right to land or receive freight in the highway on the banks of the stream, without the consent of the owner of the soil, would be a most subtle and unreasonable proposition, and wholly at war with our statute, 2 Rev. Code, c. 238, pp. 261, 262, authorizing the county courts to establish ferries on public roads through watercourses; the first section of which applies to cases where the applicant is the owner of the lands on both sides, and the third section extends the authority to those in which he is the owner on one side only: which last section is obviously founded upon the right of the commonwealth to delegate the use of the easement to the grantee of the ferry, for the purposes thereof; and both sections necessarily refer the question of qualification by riparian ownership to the decision of the county court, whose grant can only be annulled by a regular proceeding for that purpose, though it can not affect injuriously the rights of property in others. That the grantee would have no such right against the owner of the

soil, where a landing-place of the ferry happens to intersect a highway, is countenanced by the cases of *Chambers v. Furry*, 1 Yeates, 167, and *Cooper v. Smith*, 9 Serg. & R. 26 [11 Am. Dec. 658]; but even that idea is repelled by Bayley, J., in *Peter v. Kendal etc.*, above cited, and by Chancellor Kent in his Commentaries, vol. 3, p. 421, note d.

As already suggested, the defendants can not, upon these demurrers, assert a title in themselves, or deny that of the plaintiff. The declaration charges, in effect, a lawful possession of the franchise, and a wrongful disturbance thereof by the defendants; all of which is admitted by the demurrers. Moreover, the validity of the franchise can not be questioned by the defendants in any stage of this collateral action otherwise than by showing a title in themselves paramount to that granted by the public. This can only be done by plea or proofs. If the landings be not in a public highway, and the defendants show a right to the soil, the plaintiff may meet that defense by replying or proving a right to the use of them for the purposes of the ferry, derived from the defendants, or from their ancestors or predecessors. If the landings be in a public highway, it is out of the power of the defendants to show a paramount title; for they can have no right to a franchise themselves. That can only be obtained from the public, in consideration of public duties in reference thereto to be performed by the grantee, for the breach or neglect of which he is liable to prosecution and punishment. However strong, therefore, the possible claim of the defendants to the grant of a ferry, it can not be set up against the grant to the plaintiff or those under whom he claims: and even if the latter was obtained by a fraudulent or false suggestion, it can not be impeached collaterally; the only remedy, if any, being by *scire facias* in the name of the commonwealth to repeal the grant: *Silver Lake Bank v. North*, 4 Johns. Ch. 373; 2 Kent's Com. 312; *Slee v. Bloom*, 5 Johns. Ch. 381; 7 Bac. Abr. 137, *Scire Facias*, C. 3. No injustice is done by this doctrine to the owner of the soil over which a public road passes; for what injury does he sustain by the use of the public easement for the passage through, any more than to and from, the watercourse? It is not like the case of riparian ownership upon a navigable stream, where the public easement consists merely in its navigation; which, as the law is now settled, 3 Kent's Com. 425, 426, gives no right to the community to land upon its banks, and interfere with the wharfage, or other exclusive enjoyment of the owner.

For these reasons, I can not perceive the propriety of denying

the plaintiff a trial before a jury upon the merits of his cause. The structure of his declaration is not such as would in any wise exonerate him from establishing by proofs a good cause of action, or debar the defendants from any lawful defense. And even if the action could be regarded as brought for a common nuisance, the declaration shows a special damage to the plaintiff, of a direct and serious nature; and whether affecting his corporeal or incorporeal hereditament—his actual possession, or mere use and enjoyment—his right as a member of the community, or as the owner of a franchise—is, in that view, wholly immaterial. Nor is a general demurrer sustainable, if the plaintiff has made out a good case, however informally and immethodically. It seems to me, however, that there is no good objection to the declaration, whether of form or of substance; but that, on the contrary, it has been drawn with technical skill and precision.

My opinion is, that the judgment of the circuit court is erroneous in sustaining instead of overruling the demurrers, and ought to be reversed.

ALLEN, J. The first count of the declaration avers that the plaintiff was possessed of a legally established ferry; that there was a road or landing on each side of the river for approaching the ferry; and that the defendants had injured and obstructed these landings, whereby the plaintiff had been subjected to inconvenience and expense. The second count sets out a possession by the lessee of the plaintiff; describes the injury to the landings as in the first count; and concludes with averring that such injury is to the prejudice of the plaintiff's rights as reversioner. It is not averred directly in either count, that the plaintiff was possessed of or entitled to the use of the landings, except so far as such possession or use may be held to be incident to the franchise itself. A ferry, we are informed, is in respect of the landings, and not of the water: Saville, p. 11, pl. 29; and as a consequence, that the land on both sides ought to belong to the owner of the ferry. The supreme court of Pennsylvania, in *Chambers v. Furry*, 1 Yeates, 167, and in *Cooper v. Smith*, 9 Serg. & R. 26 [11 Am. Dec. 658], recognized the doctrine laid down in Saville as good law, and held that the dedication of land for a public highway gave no right to others to use it without the consent of the owner, for the purpose of landing or receiving freight; that the dedication to the public was for the purpose of passage only, and, subject to that easement, the fee remained in the owner. This, it seems to me, is

the true doctrine, notwithstanding the *dictum* in *Peter v. Kendal etc.*, 6 Barn. & Cress. 703. That was an action for a disturbance to a ferry by setting up another boat. To the objection that it was not averred that the plaintiff was the owner of the landings, it was replied, that ownership was not required: that the ferry owner must have the right to land, and it was sufficient if the landing was in a public road; or there might have been a grant or reservation of that right. The right to the landings was not there the subject of controversy; the injury complained of did not affect them, and it was not necessary to consider or determine under what circumstances the owner of the ferry might use the road.

A ferry is a valuable franchise created by law. The franchise consists in the right to demand a stipulated compensation for a particular service. Ferries are usually found on public roads; and the public having the right of passage, there can be no question that any individual, in the exercise of this right, may transport himself and property across the stream, and use the road as a landing, and that the owner can not obstruct him. But it does not follow that he can convert this personal right into a source of emolument, and at his own pleasure use the road as a landing for a ferry. The franchise to exact the tolls is annexed to the land, is private property, and the owner can not be deprived of it against his consent, without just compensation.

The right of individuals to wharves, landings, etc., in cities, referred to in the cases cited from Yeates and Serg. & R., illustrates the doctrine. The dedication of land as a street or road does not affect the right of the owner to this species of property. There is no incompatibility between the private right and the public easement. Our own statute seems to treat the ferry as being in respect of the landings. The owner of the land on both sides, or on one side, of the stream through which a public road passes, is authorized to apply for the establishment of a ferry. The law, it is true, contains no provision for condemning the land on the opposite side, where the person applying is the owner on but one side; but this probably was an inadvertent omission. The law clearly did not proceed upon the supposition, that when a public road was established, the rights of the owner of the soil, as to this subject, were extinguished, and that it would be competent to confer the franchise on a stranger, having no interest, absolute or qualified, in the soil. If I am correct in these views, it follows that where a direct injury is done to the landings, and the declaration proceeds for

the recovery of damages for such wrong, there should be an averment of possession, or of some right to the use of the landings; some averment to put the plaintiff to the proof of his right upon the trial. If the allegation that the plaintiff is possessed of the ferry comprehends the landings as appurtenant, proof of the establishment of the ferry would suffice, and the defendant might be subjected to a double recovery for the same act; to the owner of the fee for the trespass, and to the ferry owner, who may have had a mere license to use the landing, or no other right than that of any individual in the public road. For these reasons, I think the second count was bad. The injury alleged is to the inheritance, and consists of damage to the landings, not of the loss consequent upon the obstruction; for the reversioner had no claim on that ground. The injury is set out, and is described to be an injury to the landings. Whether the injury as averred would permanently affect the inheritance or not, is a question of fact for the jury: but the declaration should have averred some right to or interest in the subject itself.

The first count however, it seems to me, was good, and the demurrer should have been overruled. That count, after setting out the injury to the landings, avers, that in consequence of this act, the plaintiff was put to expense; persons being deterred from the use of the ferry, etc. This I think a sufficient averment of special damage arising from the public nuisance in injuring and obstructing the public road. And in a proceeding for this consequential damage to the ferry, the case of *Peter v. Kendal etc.*, is an authority showing that it was not necessary to aver possession of the landings. For this purpose, and where the injury goes to the enjoyment of the franchise, the grant would be sufficient as against the wrong-doer, and no question could arise as to the right to the landings. I am of opinion, therefore, that the court erred in sustaining the demurrer to this count, and that for this cause the judgment should be reversed.

STANARD, J. The court below having sustained a general demurrer to the declaration, the only question for this court is, whether the declaration and each count of it be so radically defective, either for want of right of action in the plaintiff, or for substantial defects in setting forth that right, as to justify the judgment sustaining the demurrer. The first count distinctly affirms the plaintiff's possession of a lawfully established ferry, and charges certain willful acts of the defendants, which, it is averred, consequentially impair the profits of the ferry, and

subject the plaintiff to other special damage, of expense and labor in repairing the injuries (caused by the acts imputed to the defendants) to the landings used with and appurtenant to the ferry. The averments are full and sufficient to show a right of action, if an action can be supported by the owner of a ferry for injuries, mediate or immediate, to the landings, which diminish the profits of the ferry, and subject the owner to labor and expense in the use of his franchise.

The franchise is a right, by prescription or grant, to charge and receive toll for transporting by water, from landing to landing, persons or property. The passage is generally across a watercourse, to and from public ways on either side thereof and leading thereto, and the ferry forms the connecting link between the landings, and is substantially a continuance of the public highway. As the use of landings is indispensable to the exercise of the franchise, the right to use them is incident to the lawful ownership of the ferry; and the averment of such ownership involves the averment of a right to use the landings as appurtenant thereto. If the road to the water line on each side be a highway, the grant of the franchise, by necessary implication, passes the right to use the highways, as a necessary incident to the exercise of the franchise: if the roads be not highways, the owner of the ferry may be the owner of the soil where the landings are, or may have a right of way for the uses of his ferry from the owner of the soil: if neither of these rights exists, his title to the franchise is defective; and then the action would fail, not because the right to use the landings had not been sufficiently averred, but because the plaintiff had failed in the proof of it, by failing to prove the possession of a lawfully established ferry.

The right to use the landings is then in effect averred; and the only question is, whether the acts of the defendants, and their consequences, as charged in the declaration, entitle the ferry owner to an action. The acts and consequences are alleged to operate on a subject in which the plaintiff has a right of use, impairing the value of another right to which it is incident, and to the profitable enjoyment of which it is indispensable, and subjecting him to specific damage of labor and expense. I can not doubt that this is an injury for the redress of which the plaintiff is entitled to his action. The right of passage on a highway is common to all citizens; and generally, for injuries to the highway, no private action can be sustained. But if any citizen, in the use of this common right, suffers special damage in his person or property from the obstruction or injury of another to the

highway, he is entitled to redress by action against that other. Even though the damage consist merely of the inconvenience and expense consequent on the delay of his journey, he is entitled to his action: *Rose v. Miles*, 4 Mau. & Sel. 101; *Greashy v. Codling etc.*, 2 Bing. 263; S. C., 9 Eng. Com. L. 572.

The second count is for an injury to the reversionary interest of the plaintiff in the ferry. In an action for the injury to such an interest, the declaration must expressly charge that the act complained of is to the injury of the reversion, unless the act charged be of such nature that it must be to the injury of the reversion: *Jackson v. Peaked*, 1 Mau. & Sel. 234. As a proper counterpart of this rule, the declaration is not good though it charges the act as an injury to the reversion, if the act charged can not in its nature be considered as detrimental to the reversion; as for example, entering and taking the growing crops or fruits, to which the tenant would be entitled. The second count in this case charges that the act of the defendants, and its consequences, are injurious to the reversion. The only inquiry, therefore, in deciding on the sufficiency of the count, is whether the act and its consequences, as charged, be of such a kind that they can not be considered injurious to the reversion. The consequence imputed to the act is a destruction of the landing. This surely may be injurious to the right of using the landings, and that right we have seen is incident to the franchise of a lawfully established ferry, and is commensurate in duration with the franchise, and forms part of the reversionary interest therein, as well as of the actual tenancy thereof. The destruction of the landing certainly may be an injury to the reversion, by subjecting the owner to inconvenience and expense in the use of the franchise, diminishing present rents, and reducing the present value of the reversion. It is no answer to the action of the reversioner, that the injury may be temporary, and that before the reversion falls in, and his title to the use and occupation of the ferry vests in possession, the landings may be restored, or the injury to them removed: 1 Mau. & Sel. 234. That the owner of the soil where the landings are may have an action for the injury charged in the declaration to the landings, and that that ownership is not alleged to be in the plaintiff and may be in another, so that if this action be sustained the party may be made responsible in two actions brought by different persons, is not, I apprehend, a sufficient reason for denying the action to this plaintiff, unless he be the owner of the soil. It is of frequent occurrence that a party is

subjected to several actions for the same act. The same act may in its consequences operate on different rights, existing in different persons, in the subject affected by the act. Thus, if a party cut a ditch across a public highway, and any citizen, in the use of the public highway, suffer special damage as a consequence of this nuisance, the party cutting the ditch is liable to an action of trespass at the suit of the owner of the soil; to an action on the case for the special damage, at the suit of the citizen who may have sustained it; and to an indictment for the nuisance. Other illustrations might be given.

My opinion, therefore, is, that however difficult it may be for the plaintiff to connect, by sufficient proof, the alleged consequences with the act charged on the defendants, and to make good the averment of damage to the reversion, and however small that damage may be, the second count shows a cause of action with certainty sufficient to render it good on general demurrer; and consequently, that the demurer in this case ought to have been overruled as to the second as well as the first count.

The judgment of the court of appeals was entered in the following terms: The judgment of the circuit court is reversed with costs: and this court proceeding to render such judgment as the court below ought to have given, it is considered that the demurrers of the defendants in error, to the declaration and each count thereof, be overruled. And the case is remanded for further proceeding, on a writ of inquiry to be awarded by the superior court, unless the said defendants should plead issuable to the action; and should such plea or pleas be offered by the defendants, for the trial of the issue or issues that may be made up on such plea or pleas.

CABELL, P., and BROOKE, J., absent.

FERRYMAN IS A COMMON CARRIER: *Littlejohn v. Jones*, 39 Am. Dec. 132; *Babcock v. Herbert*, 37 Id. 695.

FERRYMAN HAS NO RIGHT TO OBSTRUCT A NAVIGABLE STREAM: *Babcock v. Herbert*, 37 Am. Dec. 695.

FERRY LANDING, RIGHT TO USE OF, may be presumed from long and exclusive enjoyment: *Bird v. Smith*, 34 Am. Dec. 483.

FERRY FRANCHISE IS DEPENDENT upon governmental permission or grant: *McGowan v. Stark*, 9 Am. Dec. 712.

FERRYMAN, WHO IS NOT A: See *Clarke v. State*, 13 Am. Dec. 701.

OWNER OF FERRY IS ENTITLED TO PROTECTION, and may sustain action against rival setting up a ferry without authority: *McGowan v. Stark*, 9 Am. Dec. 712; *Newburgh Toll Road v. Miller*, 9 Id. 274.

REMEDIES FOR INJURY TO FERRY: See *Rees v. Lawless*, 12 Am. Dec. 295. and note.

BUCKLES v. LAFFERTY'S LEGATEES.

[2 ROBINSON, 292.]

PURCHASE BY AGENT OF AN ADMINISTRATRIX, FROM HIS PRINCIPAL, where he is shown to have practically conducted and had control of the administration, does not bind the beneficiaries, and they may have such sale set aside on repayment of the purchase money with interest, and the purchaser compelled to account for the rents and profits.

DELAY OF FIVE OR SIX YEARS TO COMPLAIN OF A PURCHASE MADE BY AN AGENT, is not fatal where all the complainants are non-residents, and some of them are infants and others *femes covert*.

LEGATEES HAVE NO RIGHT TO SET ASIDE A SALE of the decedent's estate, except so far as may be requisite to protect their interests.

BEFORE LEGATEES ARE ALLOWED A DECREE VACATING A SALE OF REAL ESTATE, the court should ascertain the amount due them, and if such amount can be paid out of the moneys set aside for such purpose, or is paid by the purchaser, the sale should be allowed to stand.

RESALE WILL BE ORDERED OF LANDS PURCHASED by one holding a confidential relation. The manner of making such resale and of taking the account with such purchaser stated by the court.

BILL in equity, filed in December, 1835, to have a sale made in April, 1829, vacated and rescinded, and for an account of profits, etc. The sale in question had been made by Catharine Lafferty, administratrix with the will annexed of Thomas Lafferty, deceased, to Daniel Buckles, and embraced ninety-six acres of land. Buckles, from the time the administratrix qualified, acted as her agent, and, for his services, received the commissions which she was allowed by law. An attempt was made to sell these lands at public sale, when they were bid in by one Cookus at twenty-one dollars and fifty-two cents per acre, at the instance of Buckles, and to prevent their sale at an undervaluation. Cookus was not willing to keep the lands at the price bid by him. Buckles then purchased the lands of the administratrix at private contract for twenty-two dollars per acre. He claimed that the sale was free from fraud, was upon adequate consideration, and that the price was greater than had ever been offered by any other person. The complainants were administrators and heirs of certain legatees, whose legacies were to be paid out of the proceeds of the land. They showed that Mrs. Lafferty was very old; that she was not present at any of the attempts to sell the land; that she had great confidence in Buckles, and trusted everything to him. The complainants did not reside in Virginia at the time of the sale nor afterwards; they but recently became cognizant of the facts; some of them were infants, and others were *femes covert*. Some of the witnesses

stated that, at the time of the sale, they would have given twenty-five dollars per acre for the land. The proceeds of the property out of which the decedent expected the legacies and debts to be paid, had fallen greatly short. The circuit court decreed that Buckles should reconvey to the administratrix, on receiving his purchase money and interest, and should account for the rents and profits. Buckles appealed.

Lee, Parker, Dougherty, and Stuart, for the appellant.

Samuels, for the appellees.

By Court, STANARD, J. The court is of opinion that the evidence in this case is insufficient to fasten on the appellant the charge of actual fraud or covin in the purchase of the land that belonged to the estate of Thomas Lafferty. The appellant, however, was confessedly the agent of the administratrix with the will annexed of Lafferty, on whom the power of making the sale was conferred by the will; and, as the evidence shows, an agent acting in a great degree without the supervision of his principal, and practically conducting the administration without control. A purchase by such an agent is in substance not better than a purchase from himself, and though it might bind him, is not binding on the beneficiaries interested in the execution of the trust, unless ratified by them deliberately and on full information; and they, to the extent of their interest, are entitled to the benefit of any advance that may be realized on a resale. The court is further of opinion that no such ratification of the appellant's purchase appears in this case, nor does the delay on the part of the plaintiffs in the court below to impeach the purchase (due allowance being made for the infancy of some and the non-residence of others) deprive them of their right to the aid of a court of equity.

The court is further of opinion that the plaintiffs, the legatees of Lafferty, were interested in the sale of the land and the proceeds thereof, to the extent only that those proceeds were necessary to pay their legacies; and if those proceeds, blended with the other funds dedicated by the will to the payment of those legacies, were adequate to discharge them, the plaintiffs, having under the will no interest in the surplus, would have no interest, and consequently no title, to question the sale. The allegation of the bill that part only of those legacies had been paid not being controverted by the answer, the court was justified in proceeding on the assumption that part of the legacies remained unpaid; but as that gave to the legatees but a limited

interest in canceling the purchase of the appellant or having a resale, the extent of that interest ought by a proper account to have been ascertained, to the end that the purchaser, if his purchase was not effectually questioned by any other than the plaintiff legatees, might have the opportunity, if he thought proper to use it, of removing the interest of those plaintiffs in, and consequently their right to, the experiment of a resale, by paying to them the parts unsatisfied of their legacies. If on such an account, the purchaser should not avail himself of the opportunity to prevent the experiment of a resale, the plaintiffs would be entitled to have the land re-exposed to sale at a proper upset price, to be ascertained in the manner following. An account should be taken, in which the appellant should be debited with the full amount of the profits of the land, or with a fair annual rent therefor, since his purchase, and credited: 1. With the payments made by him for the purchase, with interest on those payments from the dates respectively, at which they have been made available to the legatees; and 2. With all the substantial and permanent improvements made on the land since the purchase. The balance of such account, with the addition thereto of a reasonable amount for the commission and charges of resale, is the sum at which the land on a resale should be set up, on a credit of six, twelve, and eighteen months for equal installments of the purchase money, with interest on those installments from the day of sale. If the land and improvements should not sell for more than the upset price, the purchase heretofore made by the appellant should in all respects stand confirmed. If it should sell beyond that sum, then the former sale should be vacated, and the case further proceeded in by causing the purchase money on such sale to be paid, and a proper conveyance to be made to the purchaser, and the proceeds of sale applied: 1. To pay the charges of sale; 2. To pay to the appellant the balance shown by the said account to be due for purchase money and improvements; and the surplus to the legatees of Lafferty, according to their respective rights. The court is consequently of opinion that the decree of the circuit superior court is erroneous.

It is therefore adjudged, ordered, and decreed that the said decree be reversed, and that the appellees pay to the appellant the costs expended in prosecuting his appeal in this court. And the cause is remanded to the circuit superior court, for further proceedings according to the principles above declared.

CABELL, P., and BROOKE, J., absent.

Mr. Wharton, after stating the general rule, that an agent to sell can not sell to himself, adds: "Yet it must be remembered that a court of equity will not vacate all dealings between agent and principal. They require, however, to use the language of Lord St. Leonards, that the agent 'should deal with him (the principal) at arm's length, and after a full disclosure of all that he knows with respect to the property.' Such purchase will be valid against all the world, except the principal, who may set it aside within a reasonable time, if it appear that the conveyance was obtained by undue influence, or may ratify it if he prefer, which ratification, if made with a full knowledge of all the circumstances, will be valid." Wharton's Agency, sec. 235. See *Robertson v. Western M. & F. Ins. Co.*, 36 Am. Dec. 673; *Florance v. Adams*, 38 Id. 226.

BROWNING v. HEADLEY

[2 ROBINSON, 340.]

ASSIGNMENT OF WIFE'S CHOSES IN ACTION MADE BY HUSBAND is effectual, if, at the time of the assignment, or afterwards during his life-time, he is in condition to reduce such choses into his possession. If, however, he dies before the event happens on which he is entitled to reduce the choses into possession, his assignment is inoperative.

VALUABLE CONSIDERATION IS ESSENTIAL to assignment by husband of wife's choses in action, to deprive wife of her right of survivorship.

GENERAL ASSIGNMENT OF HUSBAND'S ESTATE IN BANKRUPTCY, or for benefit of creditors, does not defeat wife's right of survivorship in her choses in action which, though capable of being reduced to possession, are not so reduced during coverture.

WIFE'S RIGHT TO A LEGACY MAY BE ASSIGNED BY HER HUSBAND.

EQUITY WILL NOT AID A HUSBAND NOR HIS ASSIGNEE in obtaining possession of a wife's choses in action, unless an adequate provision is first made for her; and where it appears that all the property sought is not more than sufficient to make an adequate and necessary provision for the wife, the bill will be dismissed.

BILL in equity, filed March 31, 1837, by Willis Browning against Newton Headley, as executor, and Joseph and Winifred Browning and others, defendants. William Headley, dying testate, bequeathed a legacy to Winifred Browning, wife of Joseph Browning, and daughter of the testator. The will was dated April 4, 1836. It directed that testator's estate, other than his slaves, be sold, and that after paying his debts, etc., the proceeds be divided into ten equal parts, of which one was to be given Winifred Browning. The will was admitted to probate April 29, 1836. On the ensuing day, Newton Headley qualified as executor. On May 31, 1836, Joseph Browning executed to Willis Browning an assignment purporting to be of "all interest to which I am entitled, in right of my wife, Winifred Browning, in the estate of William Headley, deceased." On

December 22, 1836, commissioners were appointed to divide the slaves. They filed their report January 2, 1837, showing their allotment to Winifred Browning of "lot No. 5, viz., Rachel, Elias, and Eleanor," and that she was entitled to receive from lot 9 twenty-seven dollars and fifty cents. January 9, 1837, the legislature of Kentucky passed "an act for the benefit of Winifred Browning." It enacted "that the marriage contract heretofore existing between Joseph Browning and his wife Winifred Browning is forever dissolved, so far as respects said Winifred, who is hereby restored to all the rights and privileges of an unmarried woman, and that she be entitled, out of the estate of Joseph Browning, to receive alimony agreeably to the laws of this commonwealth." This bill was for the payment to complainant, as assignee of Joseph Browning, of the legacy of Winifred Browning. The answer of the defendant, Newton Headley, set up the divorce granted by the legislature of Kentucky, and that Mrs. Browning had notified him not to pay her share of the estate to any one. He also claimed that Joseph Browning ought not to be permitted to recover the legacy without settling a reasonable part on his late wife; that one thousand dollars had been advanced by the testator to Winifred Browning in 1829, which ought to be deducted from her share. Mrs. Browning also answered, showing that she had not lived with Joseph Browning for many years; that he had been guilty of many wrongful acts and had finally deserted her; and that she had been divorced by the legislature of Kentucky, where both parties resided. The lower court held the divorce valid, and dismissed the bill. Willis Browning petitioned for an appeal, which was allowed.

Robinson, for the appellant.

Patton, for the appellees.

ALLEN, J. This case has been argued with great learning and ability; but time has not been afforded during the term to go into a review of all the authorities, or to discuss all the questions commented upon in the argument. I shall therefore content myself with a statement of the result to which an examination of the authorities and of the facts of this case has conducted me. The doctrine as to the main question involved, the right acquired by an assignee of the husband in the wife's choses in action, has been most ably commented on in the cases of *Purdew v. Jackson*, 1 Russ. 1, and *Honner v. Morton*, 3 Id. 65; 8 Cond. Eng. Ch. 298; and in a note to the latter is found an ac-

curate report of the opinion of Lord Hardwicke in *Bates v. Dandy*, 3 Russ. 72. The rule established in *Bates v. Dandy*, and recognized in both the cases cited after a full review of all the authorities, furnishes the law of this forum, from which it seems to me we have no right to depart. That rule is, that the husband has no power to give effect to a conveyance of property of this description, unless circumstances so turn out as to put him in a situation which would have enabled him to reduce the chose in action into possession. If at the time of the assignment he is in a condition to reduce the chose into possession, the assignment operates immediately: if he is afterwards in a condition to reduce it into possession, the assignment will then have full effect: but if he dies before the event happens on which it may be reduced into possession, the assignment becomes altogether inoperative.

The assignment to deprive the wife of her right by survivorship, must be for a valuable consideration, and must also be special. A general assignment of the husband's estate for the benefit of creditors, an assignment in bankruptcy, or an assignment under the insolvent laws, would not defeat the wife's right to take by survivorship a present interest, capable of being reduced into possession, but not actually so reduced during the coverture. Treating the divorce, in the case under consideration, as a civil death, I consider the interest of the wife in her father's estate, at the time of the assignment, as a present interest susceptible of being reduced into possession; that the assignment was a special assignment for value; and therefore that she could not take by survivorship.

I am also of opinion, that by the well-settled doctrines of the English chancery court, the wife is entitled to an adequate settlement out of her estate, whenever the aid of the court of equity is invoked by the husband to get possession of such estate, if there has been no previous adequate provision made for her: that the assignee, though the assignment be special, occupies in this respect the same position with the husband: that this doctrine of the chancery court was well established and fully acted on, when courts of equity were first organized in this state: and that the chancery courts here are as much bound by this principle of equity as by any other principle of equitable jurisprudence (not inconsistent with our institutions) which has not been modified or abrogated by express enactment. In this case the claim was asserted in the answer; and there is nothing in the record which shows that the wife was not entitled to a settlement.

I am further of opinion, that upon a view of all the circumstances, the residue coming from her father's estate would not be more than an adequate provision for her; and that further inquiry was unnecessary. It is proved that the husband had squandered the advances made to him by the wife's father; that he had abandoned her with a family of small children dependent on her for support; and that in consequence of his misconduct she had obtained a divorce. The extent of the interest in her father's estate can only be inferred by reference to the consideration named in the deed of assignment. Taking the consideration expressed as the criterion of value, the amount would be but a small provision for a wife so situated. And it is not for the assignee to object that the consideration was grossly inadequate; for in so doing, he would show that the assignment was not made in good faith. The claim was made by the answer, proof was taken to sustain it, and the plaintiff failed to produce any evidence tending to prove that the whole would be more than an adequate provision.

The claim of the wife derives additional strength from her divorce, which deprives her of all claim on the husband hereafter: and as, in consequence of the divorce, she will be entitled to hold as a *feme sole*, it seems to me that the court did right in dismissing the bill.

BALDWIN, J. I have not formed, and am not to be understood as expressing, any opinion upon the question whether the assignee from the husband, for valuable consideration, of a chose in action of the wife, not reduced into possession during the coverture, has a valid title against the wife's surviving. Upon a view of all the circumstances of this case, I concur in the opinion that the decree should be affirmed.

STANARD, J. I concur in the opinion of Judge Allen, that the effect of the act of divorce upon the rights of the wife is to place her in the same situation as if her husband had then died; and that the assignee from the husband, for valuable consideration, of a present (as distinguished from a reversionary) interest of the wife, has a valid title against the wife though she survives her husband. I also concur in affirming the decree.

CABELL, P., and BROOKE, J., absent.

WADE'S HEIRS v. GREENWOOD AND WIFE.

[2 ROBINSON, 474.]

CONVEYANCE NEVER RECORDED IS EFFECTUAL to vest the title in the grantee as against the grantor, though afterwards lost or destroyed; and when followed by a long and uninterrupted possession, it furnishes a sufficient presumption against any claim of the grantor's creditors.

SPECIFIC PERFORMANCE OF CONTRACT OF PURCHASE will be decreed against a purchaser, who has gone into possession and held it for many years, though the deed under which the vendor derails title has been lost. But in such case, as the *onus* of proving such title rested on the vendor, he must pay the costs.

WHERE A DEED HAS BEEN LOST, the execution of another will be decreed, **PERSONAL DECREE** will not be rendered against the heirs of a purchaser; the decree should be that, unless they pay the debt within some reasonable time, to be specified in the decree, the lands be sold.

BILL filed in 1830, by Bartlett Greenwood and his wife Nancy, to obtain a conveyance of certain lands from the defendant, Roberts, and to have such lands sold, and the proceeds of the sale, to the extent of four hundred dollars and interest, paid to complainants. The lands were, in 1777, conveyed by James Dejarrett and wife to George Mitchell, by whom, in 1786, they were conveyed to John Welch, who, in 1788, conveyed to the defendant, Daniel Roberts. The latter sold them to Redmon Cody, who died in possession thereof, leaving as his sole heir his daughter Nancy, one of the complainants, who had intermarried with her co-complainant, Bartlett Greenwood. The testimony showed that the lands had been patented to Dejarrett; that, as early as 1794, Redmon Cody was in possession, and that Roberts said he had sold the lands to Cody; that a deed from Roberts to Cody was made, and was given to one Morgan to be recorded, and that Morgan's house was soon afterwards burned, and the deed was never recorded, nor proved for record. In May, 1814, articles of agreement were executed by Bartlett Greenwood to H. and M. Shearing, for the sale to them of the land, and they were to pay on receiving a lawful right thereto. They transferred their right to the defendant, Wade, who went into possession. Decree in favor of complainants upon their executing a conveyance, properly acknowledged, etc., to Wade's heirs, he having died pending the suit. Wade's heirs appealed, contending that plaintiffs could not make a good title as provided in the contract, and therefore ought not to have a decree for specific performance.

Garland, for the appellants.

Patton and Johnson, for the appellees.

By Court, ALLEN, J. The court is of opinion that it appears from the evidence that Daniel Roberts did convey the land in the bill and proceedings mentioned to Redmon Cody, the ancestor of the female appellee: that such conveyance, though never recorded, and afterwards lost or destroyed, was effectual as against the grantor to vest the legal title in said Cody: and that the great lapse of time since said conveyance, in connection with the continued and uninterrupted possession of the land by Cody and those claiming under him, furnishes a sufficient presumption against any claim on the part of the creditors of said Daniel Roberts. The court is therefore of opinion, that as the appellants have continued to hold possession of the property, and have not asked for a rescission of the contract, it was proper, under the circumstances of the case, to decree a specific performance of the contract; and that in this there was no error in the decree. But the court is further of opinion, that the ancestor of the appellants was not bound to take the title of the appellees until the existence and validity of the said conveyance from Daniel Roberts had been judicially ascertained; that the burden of establishing those facts devolved upon the appellees; and therefore that they should have been decreed to pay the costs. The court is further of opinion, that as there is no record of the conveyance from Daniel Roberts, a commissioner should have been directed to execute a deed from him to the appellants. The court is further of opinion, that under the authority of *Tibbs etc. v. Matthews etc.*, decided in this court on the sixth day of May, 1829, it was wrong to decree personally against the appellants, who, as heirs of the vendee, were not liable to a personal decree. The decree should have been, that unless they paid the said debt and interest within a period to be prescribed, the land should be sold. And the court is further of opinion, that in a suit to subject lands in the hands of heirs to sale, for the equitable lien of the vendor for unpaid purchase money due from their ancestor, or for the debt of the ancestor, it is, in general, an improper exercise of discretion to decree an immediate sale without allowing any time for redemption, and to decree a sale for cash: and that if circumstances exist which render it expedient to sell forthwith and for cash, such circumstances should be disclosed by the record. In the case under consideration, nothing appears to call for or justify a departure from the general rule; and the court is therefore of opinion, that there was error in directing the marshal to take possession of the land, and to sell forthwith and for ready money.

It is therefore decreed, that so much of the said decree as conflicts with this opinion be reversed, and that the appellants recover against the appellees their costs here expended; that the said decree be affirmed for the residue; and that the cause be remanded, with instructions to be finally proceeded in according to the principles above declared.

CABELL, P., absent.

DABNEY'S EX'RS v. DABNEY'S ADM'R.

[2 BOSIMON, 622.]

INDORSEMENT OF CREDIT ON A BOND MADE BY THE OBLIGEE within the period that raises a presumption of payment, may be considered as a circumstance tending to rebut such presumption, because, when made, the indorsement was against his interest.

DEBT by the administrator of Jane Dabney against the executors of Charles Dabney on a bond. This action was commenced in 1837. The bond was dated January 10, 1833, and it became due January 1, 1834. The defendants sought to set off the balance due on a bond made by Jane Dabney to C. W. Dabney, dated April 5, 1820, due on demand. On this latter bond were indorsements of partial payments, signed by Charles Dabney, one dated June 1, 1828, and the other May 5, 1829. Charles Dabney died in the year 1833, prior to the eleventh of November. There was no evidence of the time when the indorsements were made; but they must have been written prior to Charles Dabney's death. There was nothing to show that they were made with the assent of Jane Dabney, the obligor. The court instructed the jury, that after the lapse of sixteen years from the time it became due they might presume a bond to have been paid; but that such presumption might be repelled by other circumstances; and that the indorsements on the bond made by the obligee were not circumstances which could be considered by the jury as tending to rebut the presumption of payment. Verdict and judgment for plaintiff.

Grattan, for the plaintiffs in error.

C. and G. N. Johnson, for the defendant in error.

BALDWIN, J. An indorsement of credit on a bond made by the obligee within the period that raises the legal presumption of payment, is evidence for him for the purpose of repelling that presumption. This exception from the general rule that a

man's declarations shall not be evidence in his own behalf is justified by peculiar considerations. The evidence is used not to establish an original demand, but merely to rebut a presumption. The presumption thus met arises out of the imputed conduct of the obligee, to wit, his forbearing to assert his demand for many years; and the fact that he obtained a partial payment during the time goes to show that the imputation is unfounded. The evidence of the fact, it is true, is furnished by the party himself; but it proceeded from him at a time when the disclosure was against his own interest. It is evidence, too, which he had authority at the time to establish, and which it was his duty to establish, for the protection of the obligor; and after a considerable lapse of time, it is usually the only available means of showing the negative of non-payment, by the affirmative of partial payment. Upon the whole, therefore, such evidence is just, reasonable, and expedient, unless attended with too much danger of fraud; and that is sufficiently guarded against by requiring proof that the indorsement was made within the period of presumption, and consequently when it was against the interest of the obligee to make it. Ingenuity, it is true, may still suggest a complexity of circumstances rendering such a fraud advantageous to the obligee; but that is a mere possibility, and the rules of evidence must deal with probabilities.

The first decision we have upon this subject is that of *Searle v. Lord Barrington*, of which there are several reports: 2 Stra. 826; 2 Ld. Raym. 1370; 8 Mod. 278; 3 Bro. P. C., old ed., 535. In that case, which was an action upon a bond due in 1697, the defendant pleaded *solvit ad diem*, and relied upon the presumption, it being after twenty years; to encounter which, the plaintiff offered to give in evidence an indorsement of interest under the hand of the obligee in the year 1707, which evidence was objected to, but received, and a verdict and judgment rendered for the plaintiff; which judgment was affirmed in parliament. It seems, from the reports of the case, that the indorsement bore date in 1707, but none of them state that there was proof of its having been actually made at that time. Whether in point of fact there was such proof, is a matter about which there has been a contrariety of opinion: 1 Stark. Ev., pt. 2, p. 311, note (f); 1 Ph. Ev., 5th Am. from 8th Lond. ed., [349]; *Turner v. Crisp*, 2 Stra. 827; *Glynn v. Bank of England*, 2 Ves. sen. 43; *Roseboom v. Billington*, 17 Johns. 182. That, however, I regard now as mere matter of curious speculation; for it is unimportant whether the decision in *Searle v. Lord Barrington*

tion is to be considered as so restrained by the facts before the court in that cause, as to require proof that the indorsement was actually made within the period of presumption; or whether its authority is to be regarded as so limited by subsequent adjudications. It is certain that the principle of the case, so restricted, has been since uniformly recognized: See the authorities above cited, and *Rose v. Bryant*, 2 Camp. 321.

There can be no difficulty in the application of this doctrine to the case before us. The indorsements in question are in the handwriting of the obligee, who died in the year 1833. The bond is dated in 1820, and payable on demand. Of course the indorsements were made within the period of about thirteen years from the time when the bond was due. The general rule is therefore applicable, unless there be something in the peculiar circumstances of this case to constitute an exception.

It has not been and can not be supposed, that the aspect of the case is at all varied by the circumstance that the bond in question was introduced as a set-off to the bond sued upon by the plaintiff, instead of having been made the foundation of a separate action. It is equally immaterial, as I conceive, that the bond sued upon is of a subsequent period to the one in question, having been executed in January, 1833, and payable in January, 1834. This, I think, will be obvious by attending to the precise proposition we are called upon to determine. The court, at the instance of the plaintiff, instructed the jury, that after the lapse of sixteen years from the date of the bond in question, aided by other circumstances, the jury might presume it paid. Then, at the instance of the defendants, the court instructed the jury, that such presumption of payment might be repelled by other circumstances. Thereupon the plaintiff moved the court for a further instruction, that the indorsements on the bond were not to be taken into consideration by the jury to repel such presumption; which instruction the court gave. And it is upon the propriety of this last instruction that we are called upon to decide.

It will be observed, that the plaintiff relied upon circumstances not as distinct and substantive evidence, but merely to eke out a lapse of time inadequate in itself to raise the presumption of payment; the whole to constitute a substitute for the complete legal presumption presented by the lapse of twenty years. It was therefore a mere presumption which the defendants had to meet, and whether a presumption arising exclusively from the lapse of time, or from the lapse of time aided by circumstances,

I regard as wholly immaterial. Besides, if this were not so, it is impossible to say that the defendants had a right to rely upon the indorsements to encounter a lapse of twenty years, but not of only sixteen years; and if the right be the same in both instances, then it can not be objected, in regard to the latter, that the effect would be to leave the subsidiary circumstances to their own intrinsic and independent weight.

The circumstance that the bond sued upon is posterior in date to the one introduced as a set-off, furnished no legal presumption of the payment of the latter; though it was evidence which the plaintiff had a right to rely upon, in connection with other evidence, to prove the fact of payment, or, in connection with the lapse of time, to raise the presumption of payment. If used at the trial in the latter point of view, as it probably was, it did not warrant the court in withholding the indorsements from the consideration of the jury, as evidence to repel the presumption of payment. Though there may have been a presumption to repel at the time of the trial, there was none when the indorsements were made. It must be taken, therefore, that they were made when it was against the obligee's own interest to make them, unless we admit the gratuitous supposition that they were fraudulently contrived, to be used at some future period, when a presumption of payment might arise. Such a fraud is the proper subject of proof, not of conjecture; and the plaintiff was at liberty to prove it, if he could, before the jury.

My opinion therefore is, that the circuit court erred in its last instruction to the jury; for which error the judgment should be reversed, and a new trial awarded, with a direction that upon such new trial the instruction is not to be repeated.

STANARD, J., and CABELL, P., concurring, judgment accordingly reversed, and new trial awarded, with a direction that the last instruction was not to be repeated.

BROOKE and ALLEN, JJ., absent.

DAVIS ET AL. v. NEWMAN.

[2 ROBINSON, 664.]

LEGATEES CAN NOT BE COMPELLED TO REFUND TO AN EXECUTOR where he, mistaking the value of the assets, voluntarily paid them their legacies, there being no creditors of the decedent, but his estate turning out inadequate for the payment of the legacies.

ACTION between Reuben Newman, executor of James Newman, and Thomas Davis and other legatees of the decedent. The legatees sought to recover for a debt due the testator from Thomas Macon, which they claim had been lost through the fault of the executor; and the latter sought to recover from the legatees money paid them, under an impression that the debt due from Macon was collectible. The circuit court exonerated the executor, and also decreed that the legatees refund. They appealed.

Stanard, for the appellants.

Johnson and Patton, for the respondents.

ALLEN, J. The testator, after making large specific bequests, directed the residue of his estate to be divided into six parts, of which the executor was to have one, and the remaining five were divided among his children and grandchildren. He owed no debts, and the executor proceeded to make sundry payments to the five legatees. The payments were voluntary; but, as it is alleged, were made under a mistake of fact as to the value of the assets. When the money was paid, all parties supposed that a bond given by Thomas Macon to the testator in his life-time for a large amount, was good and would be collected; and the executor, in settling with the legatees, acted under that impression. The bond has turned out to be unavailing. Macon, though in the possession of an immense estate at the testator's death, was in truth greatly embarrassed, and subsequently gave deeds of trust which exhausted all his property. There being no creditors of the testator, the executor now seeks to recover back for his own benefit the sums overpaid to the legatees.

In 1 Rop. Leg. 315, it is said to be a rule in equity, to presume, when an executor voluntarily pays one or more legacies, that he has received sufficient assets to discharge the rest; and although the fact be otherwise, not to admit evidence to that effect. In such cases, therefore, the executor will be under the necessity to make up the deficiency with his own money, since he will not be permitted to institute proceedings (except in particular instances) against the legatees so paid, to oblige them to refund. See also 2 Lomax's Dig. 173; 2 Wms. Ex. 892; 1 Eq. Cas. Abr. 239. The cases referred to by Roper, of *Noel v. Robinson*, 1 Vern. 94; *Newman v. Barton*, 2 Id. 205; *Coppin v. Coppin*, 2 P. Wms. 292, and *Orr v. Kaines*, 2 Ves. sen. 194, seem to me fully to sustain the position that in England, where the executor has made a voluntary payment, he can not compel

the legatee to refund: though there may be good reason to doubt whether they fully justify the position that such payment is an admission of assets sufficient to pay all the rest of the legatees, and that, though the fact may be otherwise, equity will not admit evidence to that effect. The authority for this proposition is the opinion of Sir John Strange, master of the rolls, in 2 Ves. sen. 194. That opinion has been reviewed by President Tucker in *Gallego's Executors v. Attorney General*, 3 Leigh, 488 [24 Am. Dec. 650], and he there shows, that Sir John Strange merely says such payment furnishes a presumption of the sufficiency of assets to pay the rest of the legacies, but does not say the presumption is conclusive. In the opinion of President Tucker, such presumptions, like all others, are liable to be rebutted, and although an executor may have been willing to encounter the hazard of paying one, it furnishes no reason for being compelled to pay the rest out of his own pocket.

I should not consider such a payment to one as conclusively establishing the executor's liability to all the rest, although the assets were deficient originally; because that would conflict with the spirit of our laws and adjudications. In England, the executor is personally bound if he fails to plead. A judgment against him on any plea except *plene administravit*, or a plea admitting assets to a sum certain and *riens ultra*, is conclusive on him that he has assets to satisfy such judgment. Our statute, 1 Rev. Code, p. 384, c. 104, sec. 36, has altered the law in this respect, and a failure to plead, or mispleading, subjects him to no personal responsibility. To hold that a voluntary payment to one legatee is an implied admission of assets sufficient to pay all, would be giving to such implied admission *in pais* an effect to which the statute has declared an admission on record shall not be entitled. For, by any other than the plea of *plene administravit*, he was held to admit assets: *Hancocke v. Proud*, 1 Wm. Saund. 335, note 10.

But as between the executor and the legatee who has been paid, the cases are decisive that he shall not recover back the payment if voluntarily made. And no case has been cited which shows that such a bill has ever been sustained in England. It is certainly not shown by *Anonymous*, 1 P. Wms. 495, and *Edwards v. Freeman*, 2 Id. 447. In Virginia the question has never arisen. *Burnley v. Lambert*, 1 Wash. 308, was a suit by the legatee to recover slaves bequeathed to him, and which had been seized and sold on an execution against the executor after he had assented to the legacy. Judge Pendleton, after de-

ciding that the assent of the executor to the legacy vested the legal title in the legatee, which could not be divested at law by the creditor, remarks that the creditor is not without remedy; he may follow the assets in the hands of the legatee, or proceed against the executors, in which case the executors have their remedy in equity to compel the legatee to refund. It does not appear from the report, whether the debt was one of which the executor had no previous notice; and it was unnecessary for the court to inquire into that matter. If it was a debt of which he had no notice before paying away the assets to legatees, he had a right to compel the legatees to refund: *Nelthrop v. Biscoe*, 1 Ch. Cas. 135. And as the assets are always bound to the creditor, and he may pursue them in the hands of the legatee, even though the testator's effects would have been sufficient to pay both debts and legacies, *Anonymous*, 1 Vern. 162, there might be good reason for holding that where the executor paid a legacy with notice of a debt, believing the assets to be sufficient, and they proved insufficient to pay both, he should be permitted to compel the legatee to refund. The legatee takes subject to the liability of being compelled to refund at the suit of a creditor. And where the executor has not been culpable, and is compelled to pay the debt, it seems to me he should be substituted to the rights of the creditor he has paid. So far the strict rule of the English courts might properly be relaxed in conformity with the more liberal spirit of our legislation in regard to executors, and with the principles which led the court to give relief in *Miller's Ex'rs v. Rice etc.*, 1 Rand. 438.

Jones v. Williams, 2 Call, 102, was a controversy about accounts, and the question could not have arisen; for the money advanced to the distributee was advanced as a loan, to be returned if on a settlement he was not entitled to it; and for that reason the executor was allowed interest on the sum decreed to him. *Bowers' Ex'r v. Glendening etc.*, 4 Munf. 219, decides merely that an executor against whom a creditor obtains a decree may compel the legatee to refund. In *Gallego's Ex'rs v. Attorney General*, 3 Leigh, 450 [24 Am. Dec. 650], it was decided that where the estate proved deficient by an unexpected depreciation of the property after some of the legatees were fully paid, the unpaid legatees have a right to look to the executors for their ratable proportions of the fund, and are not bound to have recourse to the legatees who were fully paid to compel them to refund. In England, the unsatisfied legatee can not maintain a suit against the legatee fully paid to compel him to

refund, if the executor is solvent. Such Judge Tucker lays down to be the rule; and therefore, though he was of opinion in *Gallego's Ex'rs v. Attorney General* that the executors were liable only for the ratable proportion of the legacy, and not for the whole, upon the ground that payment in full to one was an admission of assets sufficient to pay all, he still held, that as the executors were quite solvent, the legatees had no right to call upon those paid to refund. The case did not call for a decision on this point, and the other judges did not notice it. If, as I conceive, the executor who has been made liable at the suit of the creditor can only be permitted to compel the legatee, whom he has voluntarily paid, to refund, by substituting him to the rights of the creditor, who could have proceeded in the first instance against the assets; where it is shown that no such original right to charge the assets exists, there is no right to which the executor can be substituted.

But even if, in a case where there was an original deficiency of assets (as in *Gallego's Ex'rs v. Attorney General*), it should be held that the executor, having through mistake paid one legatee in full, and having afterwards been compelled to pay the proportions of the others out of his own pocket, might compel the legatee overpaid to refund; the case would still fall short of that under consideration. Here the executor has not been called upon by a creditor to make good assets improperly paid away, or by an unpaid legatee to pay him a ratable proportion of his legacy out of his own pocket: he is seeking to recover for his own benefit alone. To sustain his claim to such a recovery would be against the whole series of authorities in England, commencing at an early period, and without the support of a single authority or *dictum* in our own courts.

It is the duty of the executor to make himself acquainted with the condition of the estate. The means are in his own hands, and if he neglects to avail himself of them it is his own fault. He is not compelled to pay the legatees until the debts are discharged, and until he has ascertained the precise extent of the assets. He can decline paying except under the decree of a court, and then he is entitled to call upon the legatee to refund if the estate was originally deficient; and he may with us always require a refunding bond. If, without using any of these precautions, he voluntarily pays the legatee, the latter has a right to consider the money as his own; subject, it is true, to be called upon to refund at the suit of creditors, or of an unpaid legatee if the assets were originally deficient. But these

are contingencies too remote in his apprehension, when a payment has been made to him under such circumstances, to have any influence on his conduct. The hardship of the case is greater upon the legatee than the executor. He has been in no default. No duty was imposed upon him to examine into the state and condition of the assets. He receives what a payment under such circumstances has impressed him with a conviction he will never be called upon to refund. Such unexpected additions to men's fortunes are frequently spent without much consideration; wasted in the gratification of some want to which the legacy has given birth, or released to some more needy relative. It would be the grossest injustice, under such circumstances, to permit the executor, who had thus misled him by his negligence or inattention to his duties, to compel him at some distant day to refund the money. The case of a legatee, and as between him and the executor, seems to me much stronger than the cases of *Brisbane v. Dacres*, 5 Taunt. 144; S. C., 1 Eng. Com. L. 82; and *Skyring v. Greenwood*, 4 Barn. & Cress. 281; S. C., 10 Eng. Com. L. 580, in the first of which cases Gibbs, J., remarked, that he who receives money so paid "has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money."

The only modifications of the general rule which our laws seem to call for, are those already indicated. A payment to one in full shall not be construed into an admission of assets sufficient to pay all: it merely furnishes a strong presumption, which may be rebutted by proof of an original deficiency. And in all cases where the executor is compelled to pay a creditor, he shall, upon the principle of substitution, have the right to compel the legatee to refund, and this although he had notice of the debt at the time of payment; unless he has been guilty of culpable neglect of his duty to inform himself of the condition of the estate. But where he has not been subjected to liability at the suit of a creditor, he shall not be permitted to recover back, for his own benefit, what he has voluntarily paid to the legatee.

On the particular circumstances attending this payment, the case, it seems to me, is still stronger against the executor. The testator died in March, 1816. The will was proved in a short time thereafter, and the executor qualified in October following:

but he took possession of the estate, and acted as executor immediately after the death of the testator, managing the estate according to the directions of the will. In November, 1816, the executor filed the bill in the present cause. The object contemplated in filing it was clearly nothing more than a division of the slaves. I should not consider this as affecting the validity of the settlement and decree, if free from other objections. The bill made the will an exhibit; there was a prayer for general relief; the answers consented to a division of whatever property was by the will directed to be divided; and all parties at a subsequent period proceeded to the account, without any exception or objection to the propriety of such settlement under the pleadings in the cause. After this, it seems to me to be too late to start the objection here. On the coming in of the answers, commissioners were appointed to divide the slaves, who made the division in January, 1817. This being done, no further proceedings were had in the cause until August, 1825, when it was ordered (on whose motion does not appear) that the report of the division should be confirmed, and that the commissioners should settle the executorial account. In the mean time, and as early as September, 1817, an informal statement and settlement of the accounts was made at the instance of the executor. At this time the executor had fully informed himself of the condition of the estate. There were no debts to pay; nothing to do but to ascertain the amount and pay the legatees their proportions. Charging the bond due from Macon to the testator as part of the available assets, these proportions were ascertained, and the executor proceeded to make payments. That the condition of the estate was fully known to the executor at that time, is manifest from a comparison of the statement made in 1817, with the settlement returned in the cause under the order of 1825. The items correspond throughout; and the only difference between them arises out of the Macon bond, which was not estimated as part of the assets at the last settlement. Excluding this bond, the executor had overpaid; and this over-payment he seeks to recover back, because the bond was estimated as part of the available assets under a mistaken impression that Macon was perfectly solvent; an opinion entertained as well by the legatees as the executor.

Conceding this to be the fact, how does it benefit the executor? He had control of the bond, and it was his duty to satisfy himself of the solvency of the obligor. The legatees were passive. They made no misrepresentation. It does not appear that

they were even urgent for the payment of their legacies. The estate being entirely free from debt, it was the duty of the executor (and his interest too, he being entitled to much the largest portion) to settle up and pay the legatees in the course of the year. This bond constituted a large portion of the assets. He could not have been charged with it until he had collected it. If he did not intend to risk the solvency of the obligor, he should have instituted suit upon it, or at least excluded it from the statement on the faith of which the legatees received the payments. Under these circumstances, and after having held it up for eighteen months from the probate of the will, and then brought it into the account, his conduct was tantamount to a representation to the legatees that the bond was good, and that he as executor was willing to take it. The defendants insist in their answers that there was an express agreement to that effect; and the evidence, if it does not establish it, tends to prove it. But the transaction speaks for itself. He charged himself with the bond; and the legatees, on the faith of this act, voluntary on his part, and after full time to satisfy himself of the solvency of the obligor, received what he thus induced them to believe was their own. Supposing he made an innocent mistake, does that give him a right, not only to discharge himself, but to charge others who were misled by him?

Though I should not consider him guilty of such laches in failing to collect the bond as to render him responsible for its whole amount, yet the question assumes a very different aspect when he seeks to recover back, for his own benefit, what he has paid on account of it. The obligor, at the death of the testator, and when the executor qualified, was in possession of a very large estate; his embarrassments were unknown in the neighborhood. Who can say, that if the executor had proceeded promptly to enforce payment, the bond would not have been secured or paid? In December, 1817, the deed of trust from Macon was recorded, having been executed by him in June previous. But at what time the debts were all contracted does not distinctly appear. Some of them may have been, and probably were, incurred after the death of the testator and the qualification of the executor. It clearly appears that he was solicitous to maintain his credit. The debt due the testator was but a trifle in comparison with the immense estate in his possession and to all appearance unincumbered. If the executor had insisted on payment within the year when he was bound to settle up, can any one undertake to say that the debt would not have been paid or secured? All that

the record shows him to have done was to make an application to the debtor. In the exercise of a proper discretion the executor may abstain from calling in debts well secured. Where, from the condition of the estate, it can not be distributed or paid out in consequence of controverted claims, much latitude of discretion may be allowed; and if without any culpable default of the executor, loss should result from the insolvency of debtors supposed to be good, the circumstances may exempt him from liability. Here the general impression of the solvency of the debtor may be a sufficient defense against the charge of culpable negligence, and relieve the executor from the payment of the whole amount, but does not, as it seems to me, furnish any claim to recover back what he has paid.

It has been contented that this was a compulsory payment, in which case the executor may recover back: *Newman v. Barton*, 2 Vern. 205. There is nothing in the record to justify this position. There was a suit instituted by himself, in which, for the reasons already given, it was competent to go on and settle the estate. But he paid before any settlement was made in that suit, when in fact no settlement was contemplated, and upon a statement voluntarily furnished by himself.

Upon the whole, without considering the effect of the statute of limitations on the claim of the executor (though the great delay furnishes another strong circumstance against this pretension), it seems to me that both the rules of law and the particular circumstances of this case should preclude his recovery.

BROOKS and BALDWIN, JJ., concurring, decree reversed.

CABELL, P., and STANARD, J., absent.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

DOTY v. STRONG.

[1 PIERCE, 313; BURNETT, 153.]

WHERE DEFENDANT'S DEFAULT IS WAIVED ON CONDITION that he will plead to the merits, he can not file a general demurrer.

COMMON CARRIERS, DEFINITION OF.—Common carriers are persons who undertake for hire or reward to transport the goods of such as choose to employ them from place to place.

PROVE THAT DEFENDANTS ARE COMMON CARRIERS, an advertisement in the public newspapers, notifying the public that they had undertaken the business of common carriers, is legal and proper evidence.

TIME OF RETURNING A DEPOSITION INTO COURT is not limited by any rule of court or of law; and the fact that it was not returned for two months after it was taken, and then but four days before the trial, is no objection to its admission.

NO SPECIAL CONTRACT WITH COMMON CARRIER IS NECESSARY to subject him to all the liabilities as such to the person applying; because the undertaking of a common carrier is general and embraces every one in the community, and to make it particular as an undertaking with a single individual it is only necessary to apply with the goods to the carrier.

COMMON CARRIERS ARE LIABLE FOR REFUSING TO CARRY GOODS when properly requested, as well as for negligent carrying, or failure to carry, after the goods have been delivered to them.

DELIVERY TO AND ACCEPTANCE BY CARRIER NEED NOT BE PROVED in an action against him for a refusal to receive and carry the goods.

REFUSAL TO INSTRUCT ON ABSTRACT PRINCIPLES OF LAW, not presented by the record, nor by the facts in the case, is not error, however correct the principle, applied to a proper case.

COMMON CARRIER IS NOT EXCUSED for refusing to transport goods, by the fact that no freight boats passed between the points of transportation; though the fact that no boats could possibly pass would excuse him.

DEPOSITION OR WITNESS SHOULD BE OBJECTED TO AT TIME of offering to read the deposition or swear the witness; if once admitted, the court can not take either from the jury by instruction.

AssumpT to charge the defendants as common carriers for losses arising from their refusal to transport plaintiff's goods. The deposition of one Ormsbee, mentioned in the opinion, was to the effect that deponent heard a conversation between plaintiff and Jones, one of the defendants, in which Jones said that he and the other defendants were engaged in the business of transporting property; that he assured the transportation of the plaintiff's goods; that, though constantly urged, the shipment was put off till winter; that Strong said to Jones that he had intended to ship his goods by another route, but having seen the defendants' advertisement in the paper, had concluded to ship them that way; that Jones, on being asked, said they had inserted the advertisement and would live up to it; and also said that Strong's storing the goods in Bruce's warehouse made no difference, as it was the most convenient place, their own not being completed; and that Strong's arrangement to pay the freight was satisfactory. The remaining facts, the instructions of the court, and the exceptions, sufficiently appear from the opinion of the court. Verdict for plaintiff and judgment thereon, to reverse which the defendants brought this writ of error.

Jackson and Collins, for the plaintiffs in error.

Dunn and Whiton, contra.

By Court, DUNN, C. J. Error is prosecuted in this case to reverse the decisions and opinions of the district court of Dane county, on the various grounds presented in the assignment of errors. The declaration of Strong, plaintiff in the court below, alleges: "That the defendants (who are plaintiffs in error) made arrangements, on or about the twenty-sixth of May, 1838, at Green Bay, in the county of Brown, and territory of Wisconsin, to transport merchandise from said Green Bay to a place called the Wisconsin Portage, at or near Fort Winnebago, in the county of Portage, in said territory, in Durham boats of thirty tons burden, and that they then and there undertook, assumed, and promised to the public, to transport, for the sum of one dollar and twenty-five cents per hundred pounds, from Green Bay aforesaid, to the Wisconsin Portage aforesaid, all such merchandise or freight as they should thereafter reasonably be requested to do." And the said plaintiff further averred in his said declaration, "that afterward, on the tenth day of September, 1839, at Green Bay aforesaid, he then and there had a large quantity of freight, consisting of household furniture and merchandise, of the weight of twelve thousand pounds,

and that the defendants were then and there requested by the agents of the plaintiff to transport the same from Green Bay aforesaid to the Wisconsin Portage aforesaid, but the said defendants, not regarding their said undertaking, refused so to do, to the damage of the plaintiff," etc., alleging special damage. The general issue was pleaded, and issue being joined, the parties proceeded to trial. During the progress of the trial many exceptions were taken to the opinions of the court, which will be considered in their order.

The last error assigned to an opinion of the court, on a question which had arisen before issue joined, for the sake of order, will be first considered. It is insisted by the plaintiffs in error, that "the court erred in refusing to entertain the demurrer filed by the said Jones and Irwin to the declaration of the said plaintiff below at the November term of the court." To understand this supposed error, it is necessary to consult the record embracing this part of the proceedings in the case. From the record it appears, that at the said November term, two of the defendants below, Jones and Irwin, were in an attitude to be defaulted for want of a plea under a rule; that the plaintiff below waived his right to a default, upon the terms that the said defendants should plead to the merits and proceed to trial. The defendants, under this waiver, filed their general demurrer, to which the plaintiff, Strong, objected, as against the terms of the waiver. The court continued the objection under advisement to a subsequent day of the term, and thereafter, on the seventh day of the term, the court decided "that the said plaintiff had a right to insist on the terms of his waiver," whereupon, on leave, said plaintiff withdrew his joinder in demurrer, and the said defendants, Jones and Irwin, pleaded the general issue, the plaintiff joined, and the trial progressed.

We are of opinion that the terms of waiver are such as the plaintiff might properly have imposed; that the demurrer was not a plea to the merits, therefore not a compliance with the terms; that the plaintiff interposed his objection timely, and that the court decided correctly in enforcing the terms. The joinder in demurrer, after the objection raised, without withdrawing it, does not vary the case, or imply a consent of the plaintiff to join in demurrer and waive his term, because his objection was pending for the opinion of the court, which, if sustained, dispensed at once with the demurrer, and the joinder was only contingent, to be entertained if the objections were overruled. The leave to withdraw the joinder was not neces-

sary, as by the decision of the court, the demurrer was rejected as against the terms of the waiver.

In addition to the supposed error disposed of, the following are assigned: 1. The court erred in admitting the newspaper containing the advertisement of the Fox River Navigation Company, and also the file of newspapers from July to October, 1838, in evidence. 2. The court erred in admitting in evidence the contract entered into between the plaintiff and Calvin Frink. 3. The court erred in admitting in evidence the contract entered into between the plaintiff and William Longdo. 4. The court erred in admitting in evidence the deposition of Thomas J. Ormsbee. 5. The court erred in refusing to instruct on the first point submitted by defendants. 6. The court erred in refusing to instruct on the second point submitted by defendants. 7. The court erred in refusing to instruct on the third point submitted by defendants. 8. The court erred in refusing to instruct on the fourth point submitted by defendants. 9. The court erred in refusing to instruct on the fifth point submitted by defendants. 10. The court erred in refusing to instruct on the sixth point submitted by defendants. 11. The court erred in refusing to instruct on the seventh point submitted by defendants. 12. The court erred in refusing to instruct on the eighth point submitted by defendants. 13. The court erred in refusing to instruct on the ninth point submitted by defendants.

The defendants below were sued as common carriers; persons who undertake for hire or reward to transport the goods of such as choose to employ them from place to place. To make them liable as such, it is certainly incumbent on the plaintiff below to prove that they were, at the time of the act complained of, common carriers within the definition laid down, by such acts on their part, as indisputably fixed that vocation upon them. An advertisement in the public newspapers, notifying the public that they had undertaken the business of common carriers, is legal and proper evidence. It is necessary that the plaintiff should by evidence have identified the defendants with the public notice. The introduction of such evidence, unsupported at the time by proofs showing that the advertisement was the act of the defendants, might appear to be erroneous, but if in the progress of the trial, proofs are adduced supplying this deficiency, then the decision of the court in permitting the advertisement to be read in evidence, is relieved from every appearance of objection. The deposition of Ormsbee, made a part of the record in this case by the exception to the opinion of the court, permitting it

to be read as evidence on the trial (which exception was not well taken, as we shall show), proves conclusively that the advertisement was the act of the defendants. The first error assigned is not well taken. The second and third errors are similar, and may be disposed of together. The plaintiffs in error assume, that the district court erred in permitting two contracts, one between Strong, plaintiff below, and Calvin Frink, and the other between the said Strong and William Longdo, to be read as evidence on the trial. It is sufficient for the court to say, that the contracts referred to are not made a part of the record in this case by the bill of exceptions, and that the record presents nothing that will enable us to decide the points raised. Therefore, they are dismissed, without further comment.

The fourth error assigned, against the admission of the deposition of Ormsbee, is not apparent to the court. The rules, interrogatories, and cross-interrogatories, choice of commissioners by the parties, commission, taking of the deposition, certifying, sealing up and directing the same, are all unexceptionable. There were two points raised in the arguments of the error assigned: 1. The deposition was returned some two months after it was taken. 2. It was delivered by the plaintiff in the action into the district court, on the second day of the term at which the cause was tried, only four days before the trial. There is no rule of court or of law which limits the time of returning a deposition into court, or directs by whom or how it shall be conveyed. If a deposition is properly taken, certified, sealed up, directed, and the matter thereof is legal and proper evidence in the case, and it is ready in court before the trial, there certainly can exist no reason in law why it should not be read as evidence. We consider these to be the requisites of a legal and admissible deposition of a witness residing out of the territory, under the law and rules of court: 1. The entry of a proper rule for a commission; 2. Due notice thereof to the opposite party, his agent or attorney; 3. The issuing of a commission under the rule in due form by the clerk, under seal, directed to the commissioner named, accompanied by a certified copy of all the interrogatories on file, with the names of the witnesses to be examined, and a copy of the first, fifth, and sixth rules on the subject of depositions; 4. A compliance of the commissioners with the said fifth and sixth rules in taking the deposition and certifying the same; 5. A compliance with the said first rule in sealing up and directing the same; and 6. That the matter thereof be legal and pertinent evidence in the case. Ormsbee's deposition, by applying

this test, is free from exception, and the district court did not err in permitting it to be read as evidence on the trial.

The fifth error assigned is that the court erred in refusing to instruct the jury on the first point submitted by defendants. The first instruction asked is: "If the jury believe that there is no proof of a contract between the plaintiff and defendants to carry the goods in question, other than the general advertisement to the public, then the plaintiff can not recover." In deciding this question, we must consider the nature and extent of the undertaking of the defendants as applicable to the instruction asked. The definition of "common carriers" given, affords an easy solution of the question. "A common carrier is one who undertakes for hire or reward, to transport the goods of such as choose to employ him, from place to place." This is a general undertaking, and embraces every one in the community, and to make it particular, as an undertaking with a single individual, it is only necessary that he should apply with such goods as the common carrier has undertaken to transport, in condition to be transported, at the place designated, to have the goods carried on the terms proposed in the undertaking; then the contract becomes identical with the person thus applying, and it requires no other special contract between the parties, to subject the common carrier to all legal liabilities as such, to the person applying: *Allen v. Sewall*, 2 Wend. 327; *Bank of Orange v. Brown*, 3 Id. 158. The district court decided correctly in refusing the instruction.

The sixth error assigned is, "that the court erred in refusing to instruct on the second point submitted by defendants." The second instruction asked is: "If the jury believe that there is no proof of delivery of the goods in question, by the plaintiff or his agent to the defendants, and an acceptance by the defendants of said goods, then the plaintiff can not recover." This instruction seems to have contemplated a different cause of action than that set up in the plaintiff's declaration. This would have been a proper instruction in substance, if the plaintiff had sought to recover for negligence in carrying, or a failure to complete the carrying and delivery. This action is brought to recover damages for an absolute refusal to receive and carry; for a violation *in limine* of the undertaking of the defendants. It can not be questioned that common carriers are liable for refusing to carry, when properly requested, as well as for negligently carrying or failing to carry after the freights have been delivered to them: *Jackson v. Rogers*, Show. 828, 8d ed. 554.

Chief Justice Jeffries held, "that the action was maintainable as well against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe a horse, being tendered satisfaction." The same opinion is held by Chief Justice Holt in *Boson v. Sandford*, 1 Id. 101, 3d ed. 66. These opinions are sustained by various decisions referred to in the cases cited. To insist that there should be proof of delivery and acceptance, when the gist of the action is an absolute refusal to receive and carry, appears to the court to be entirely against law and reason. The district court was correct in refusing the instruction.

The seventh error assigned is, "that the court erred in refusing to instruct on the third point submitted by defendants." The third instruction asked is: "If the jury believe from the evidence, the goods in question remained in possession of the agent of the plaintiff, and never were in the possession of the defendants as carriers, then the plaintiff can not recover." It is so apparent, that it seems scarcely necessary for the court to remark, that the reasoning and authority which dispose of the second instruction apply equally to this. If our opinion is sound on that, we must concur with the district court in the propriety of refusing this also.

The eighth error assigned is, "that the court erred in refusing to instruct on the fourth point submitted by defendants." The fourth instruction asked is: "If the jury believe from the evidence, the goods in question were deposited by the plaintiff or his agent in the warehouse of Bruce, a third person, and that Bruce had a lien for charges on said goods, the defendants were not bound to carry them in the absence of a special contract, unless the plaintiff shows, that said lien for charges was previously discharged, and he can not recover." This instruction also grows out of a misapprehension of the plaintiff's true cause of action. Under a different state of case averred by the plaintiff and raised in the testimony, this instruction might have been proper. Considering the true cause of action and the facts presented on the record, it would not have been a proper instruction. If no other reason existed, the one assigned by the court was sufficient: "Because the supposition of charges is against the evidence in the case." The rule is, that a refusal to instruct on abstract principles of law, not presented by the record, nor by the facts in the case, is not error, however correct the principle, when applied to a proper case. Without claiming that the court should respond to the facts in a case, it must necessarily respond, so far as to decide whether a principle of law is raised

by the facts, that the case may not be embarrassed by matters entirely foreign. If the charge had been given, would the result have been different, presuming that no other than legal evidence was produced at the trial? Ormsbee's deposition is the only evidence presented in the record for the inspection of this court; from this evidence, with the instruction, no other finding of the jury could have resulted. The district court properly refused the instruction.

The ninth error assigned is, "that the court refused to instruct on the fifth point submitted by defendants." The fifth instruction asked is: "If the jury believe from the evidence, the defendants assumed to carry the goods in question for a certain price, and the plaintiff has not shown a compliance with the terms of such assumed contract, by tendering or paying said price, then the plaintiff can not recover." The court refused to give the instruction, and referred to the evidence in the deposition. This instruction is like the one just disposed of, upon which we have expressed an opinion.

The tenth error assigned is, "that the court erred in refusing to instruct on the sixth point submitted by the defendants." The sixth instruction asked for is: "If the jury believe from the evidence, that the defendants did not assume to carry the goods in question, but merely neglected and refused to carry the said goods, the defendants are not liable under a general advertisement to carry for the public, and the plaintiff can not recover." We consider this ground of error disposed of, by our opinion on the first instruction asked for by the defendants below, and will add nothing further to what is there laid down.

The eleventh error assigned is, "that the court erred in refusing to instruct on the seventh point submitted by the defendants." The seventh instruction asked is: "If the jury believe, from the evidence, that no freight boats passed up Fox river after the plaintiff's goods were deposited in Bruce's warehouse and not in the possession of the defendants, then the plaintiff can not recover." Admit that the facts were as assumed in the instruction, they would not amount to a defense, even in a case to which they might apply. That boats could not possibly pass up Fox river at the time of the request made by the plaintiff, for causes entirely out of the control of the defendants, would excuse them for refusing to carry. The fact that they did not pass up is a very different thing, and more allied to the plaintiff's cause of action than to the defense. The court properly refused the instruction.

The twelfth error assigned is, "that the court erred in refusing to instruct on the eighth point submitted by defendants." The eighth instruction asked is: "If the jury believe from the evidence, that there was no special contract to carry the goods in question, and no delivery of the same to the defendants by the plaintiff, and that there was only a qualified promise to carry the same if the defendants were able to do so, then the plaintiff can not recover on an alleged breach of contract made to the public." There are three distinct matters embraced in this instruction: No special contract; no delivery; and a qualified promise to carry. The two former have been disposed of against the error assigned, and the latter branch of the instruction was given as asked, with the remark by the court, that the facts show a different state of case. The language of the court in the instruction, "if there were only a qualified promise to convey the goods, the plaintiff can not recover on a general promise," fixes the character of the instruction, and shows conclusively, that the court intended the jury should respond to the facts, to which the principle of law was applicable. And the intimation in this instance does not infringe the rule, in its most rigorous sense, that the court should respond to the law, and the jury to the facts.

The thirteenth error assigned is, "that the court erred in refusing to instruct on the ninth point submitted by defendants." The ninth instruction asked is: "The court is requested to instruct the jury, to throw out of consideration all evidence proving a special contract of the defendants with the plaintiff, in relation to the carriage of the goods in question, as the plaintiff has not alleged in his declaration any such contract with him." The court refused so to instruct, remarking: "as the law, on the undertaking of the defendants as set forth in their advertisement, implies a contract; and as the court supposes from remarks made on the deposition of Ormsbee, objecting to the same, for the reason that it was evidence of a special contract, that the instruction asked for is to rebut or reject that evidence." The rule is, that a deposition or witness should be objected to at the time of offering to read the deposition or swear the witness. If once admitted, the court can not take either from the jury by instruction. The court may instruct the jury to disregard evidence or testimony, on the ground of interest developed on the trial. The court properly refused the instruction.

It is the opinion of this court that the judgment of the district court of Dane county be affirmed, with costs.

COMMON CARRIERS, WHO ARE: See note to *Gordon v. Hutchinson*, 37 Am. Dec. 464, referring to other cases in this series; *Littlejohn v. Jones*, 39 Id. 132.

COMMON CARRIER IS BOUND TO RECKIVE GOODS and transport them at a reasonable compensation: *Cole v. Goodwin*, 32 Am. Dec. 470.

OBJECTIONS TO TESTIMONY IN DEPOSITIONS, WHEN TAKEN: See *Strickler v. Todd*, 13 Am. Dec. 649; *Ocean Ins. Co. v. Francis*, 19 Id. 549; *Town v. Needham*, 24 Id. 246; *Fletcher v. Sanders*, 32 Id. 96.

ABSTRACT INSTRUCTIONS SHOULD NOT BE GIVEN: *State v. Reigart*, 39 Am. Dec. 628, and note referring to other cases in this series.

TECHNICAL OBJECTION TO FORM OF ACTION AFTER OPENING DEFAULT, on affidavit, to let in a defense on the merits, will not be permitted: *Mel v. Sneyly*, 38 Am. Dec. 758.

ROLETTE v. ROLETTE.

[1 PINNEY, 570; BURNETT, 236.]

DEED FOR SEPARATE MAINTENANCE OF WIFE, made after the separation has taken place, is valid.

BILL in chancery in the Crawford district court. The opinion states the case.

Eastman, for the appellant.

Burnett, contra.

By Court, IRVIN, J. Joseph Rolette filed his bill in the district court of Crawford county, from which it appears, that the said Joseph Rolette, and Jane Rolette his wife, and Bernard W. Brisbois as trustee, entered into an agreement for the separate maintenance of the said Jane, by which an annuity was settled upon her during her life, the payment of which was secured her by bond and mortgage. The object of the bill in this case is, to set aside and cancel that deed for a separate maintenance, as well as the bond and mortgage, for the reason that the said deed, bond, and mortgage were made without any legal or adequate consideration; "and with a view to accomplish an illegal object, which the said parties had no right to assume upon themselves to accomplish, and that the same is contrary to the laws of the land, and the salutary customs and usages of society, and ought to be set aside." To this bill a general demurrer was filed, which upon argument, was sustained by the district court, and from which decision an appeal was taken to this court.

When this deed which is made a part of the bill is examined, it is found to be strictly such as is sanctioned and sustained by the authorities. In support of the bill, the counsel relied on the case of *Rogers v. Rogers*, 4 Paige, 516 [27 Am. Dec. 84], and the

authorities therein cited; *Westmeath v. Westmeath*, 4 Eng. Eco. 228; *Mortimer v. Mortimer*, Id. 543; *Carson v. Murray*, 3 Paige, 483; *Lord St. John v. St. John*, 11 Ves. 536; *Marshall v. Button*, 8 T. R. 545; 2 Story's Eq. 652, 654; 1 Chit. Pr. 58. In resistance of this bill, and in support of the demurrer, the counsel for the defendants relied on 4 Petersd. Abr. 85; *Cooke v. Wiggins*, 10 Ves. 191; *Rodney v. Chambers*, 2 East, 283; *Gawden v. Draper*, 2 Vent. 217; *Moore v. Moore*, 1 Atk. 272; *Lord Vane's Case*, 13 East, 171; *Fenner v. Lewis*, 10 Johns. 38; *Baker v. Barney*, 8 Id. 72; *Carson v. Murray*, 3 Paige, 483; 2 Kent's Com. 161; and *Shelthar v. Gregory*, 2 Wend. 422.

The deed herein set forth is not a deed for the separation of the plaintiff and his wife, and which as such, would have been obnoxious to many of the authorities cited by the counsel for the complainant, but is a deed for the separate maintenance of the wife made and entered into many years after the separation had taken place. Such deeds being allowable, and when entered into sustained by the courts, we can see no objection, from anything which arises out of the nature of this contract, to the decision of the district court. If there be anything in this particular case to be objected to in support of the bill, it must arise out of the deed itself, but which, as we have already said, upon examination, we find to be strictly such as is sanctioned and sustained by the authorities. We therefore think the decision of the district court right, and affirm the same with costs.

HUSBAND'S STIPULATION TO ALLOW A SEPARATE MAINTENANCE to his wife, through the instrumentality of a third person, as auxiliary to an agreement for a separation, may be enforced at law or in equity: *Helms v. Franciscus*, 20 Am. Dec. 402; and see *Mercein v. People*, 35 Id. 653; *People v. Mercein*, 38 Id. 644; *McKennon v. Phillips*, 37 Id. 433; *State v. Reigart*, 39 Id. 623, and note.

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 2. AGENT TO SELL REAL ESTATE MAY BIND HIS PRINCIPAL BY COVENANTS OF WARRANTY in his deed, where his authority is to "sell for the best prices, either by public auction or by private contract, etc., and to sign, seal, and execute all or any such contracts, agreements, conveyances, and assurances, and to do and perform all such acts or things for perfecting such sales as shall be requisite and necessary in that behalf." It seems that the authority to bind the principal by sealed contract is co-extensive with the power to bind by covenant of warranty. *Peters v. Farnsworth*, 671.
 3. CONSTABLE, RECEIVING NOTE TO COLLECT, IS AN AGENT of the creditor to receive payment therefor, but can only receive it in money. *Cooney v. Wade*, 657.
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 3. PROMISE BY DEBTOR TO PAY AN ASSIGNEE does not create an estoppel where it is made posterior to the assignment. *Id.*
- See COSTS, 3; GAMING, 4; HUSBAND AND WIFE, 7-11; JUDGMENTS, 13; PARTNERSHIP, 4-7.

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2. **TO MAKE AN OFFICER A TRESPASSER AB INITIO HE MUST ABUSE THE SAME AUTHORITY** upon which was the original taking. Thus an officer who has seized under a writ of attachment a chattel in which the defendant is a tenant in common, is not, by his subsequent sale under execution of the entire property in the chattel, constituted a trespasser *ab initio*, who may be sued in trespass as for an original unlawful taking. *Id.*
3. **ATTACHMENT CAN NOT ISSUE, AGAINST THE PROPERTY OF A NON-RESIDENT**, at the time of filing a bill, in the hands of a resident defendant; but after process has been served on the resident defendant, and an affidavit made as to the absence of the other, the court may require surety for the safe keeping of the property for its production to answer the decree. *Comstock v. Rayford*, 102.
4. **CREDITORS, IN ORDER TO ATTACK A SALE ON THE GROUND OF FRAUD**, must prove their debts. *Sanford Mfg. Co. v. Wiggin*, 198.
5. **SHERIFF WHO SEIZES GOODS IN THE POSSESSION OF A THIRD PARTY**, on a writ against the vendor, on the ground that the sale of such goods was fraudulent, must, in order to protect himself, prove the existence of a debt in favor of the attaching creditor. Simply proving that the writ was issued in a pending suit upon a promissory note is not enough. *Id.*
6. **OWNER OF GOODS WHO RECEIPTS FOR THE SAME AS ATTACHED** is liable in trover to the officer, if he refuses to deliver them to the latter upon demand, although no actual seizure of the goods, under the writ of attachment, preceded the receipt, where the goods were at that time in the possession of the receptor. *Pettes v. Marsh*, 689.

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See **CORPORATIONS**; **ESTATES OF DECEASED PERSONS**, 1; **HUSBAND AND WIFE**, 9.

BANKS AND BANKING.

1. **BANK RECEIVING A BILL FOR COLLECTION**, discharges its duty, if, when the bill becomes due, it places it in the hands of a notary for protest and for the proper notices to be given, and is not liable though recourse is lost against the indorsers because of the failure of the notary to properly discharge this duty. *Tiernan v. Commercial Bank*, 83.
2. **BANK INTRUSTED WITH A NOTE FOR COLLECTION** is bound to the exercise of due and proper diligence in making demand and giving notice, so as to hold all parties liable, and in default of such diligence becomes responsible to the holder of the note. *Commercial and R. R. Bank v. Hamer*, 80.
3. **DEMAND MADE AFTER THE CLOSE OF BUSINESS HOURS** at the bank at which the note is payable is yet sufficient if the proper officer of the bank is found, and his refusal to pay is upon the ground that there are no funds in the bank to meet the note, and that there have not been at any time during business hours. *Id.*

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BONA FIDE PURCHASERS.

1. **BONA FIDA HOLDER OF NEGOTIABLE PAPER**, acquired for a valuable consideration, and without notice of, or reasonable ground to suspect, any defect in the title of the person from whom he received it in the ordinary course of business, is entitled to protection, to the extent, at least, of the consideration paid therefor. *Stalker v. McDonald*, 389.
2. **HOLDER OF NOTE WHO TOOK IT IN PAYMENT, OR AS SECURITY FOR THE PAYMENT, OF AN ANTECEDENT DEBT**, without parting with anything of value, can not hold it against a prior equitable owner; and in the event of his having paid a part of its value, he is treated as a *bona fide* holder to the extent of such payment only. *Id.*
3. **BONA FIDA HOLDER FOR A VALUABLE CONSIDERATION**.—Various cases tending to show the signification of these words cited and discussed. *Swift v. Tyson*, 16 Pet. 1, disapproved. *Id.*
4. **GRANTEE IN DEED TAKEN FOR PRIOR DEBT IS NOT DEEMED BONA FIDE PURCHASER**, entitled to protection against trusts of which he had no notice; but it is otherwise if he releases a valid security for such prior debt, and can not be replaced in his former situation as to security. *Padgett v. Lawrence*, 232.

See FRAUDULENT CONVEYANCES; GAMING, 6; USURY, 1.

BONDS.

1. AUTHORITY TO EXECUTE BOND AS AGENT FOR ANOTHER, whether for money or other property, must be under seal. *Graham v. Holt*, 408.
 2. BOND EXECUTED UNDER PAROL AUTHORITY is void; therefore, where the obligor, by parol, authorizes a third party to fill in the amount of a bond, the bond is void. *Id.*
 3. OBLIGEE IN A BOND EXECUTED BY THE DECEASED, binding on himself and his heirs, might, at common law, sue either the heir or executor at his election, and have execution against the lands of the deceased, unless the same had been specifically devised, or the heir had aliened them prior to action brought. *Ticknor v. Harris*, 186.
- See CORPORATIONS, 7; GUARDIAN AND WARD; PARTNERSHIP, 2; STATUTE OF LIMITATIONS, 1, 2, 7; SURETYSHIP, 6, 9; WILLS, 25.

BOUNDARIES.

1. CALL IN GRANT FROM ONE TERMINUS TO ANOTHER is *prima facie* understood to mean a direct line from the former to the latter point, where there are no accompanying words of description which indicate that the line is not to be a direct line. *Shultz v. Young*, 413.
2. CONSTRUCTION OF INSTRUMENT SHOULD GIVE EFFECT to every part thereof; and in expounding the descriptions in a deed or grant, they should all be reconciled, if possible. *Id.*
3. DEFECTIVE DESCRIPTION, HOW CORRECTED.—Where the disputed boundary proceeded from a certain point "south with R. G.'s line three hundred and ten poles to T. G.'s old corner," and in reality R. G.'s line did not reach the corner mentioned, the boundary will be ascertained by following R. G.'s line as far as called for, and then running a line from thence to T. G.'s old corner, though two lines are thus formed instead of one, when it is clear that the parties intended to include R. G.'s line in the description. *Id.*
4. STATEMENTS AS TO THE BOUNDARY LINES OF CERTAIN LAND, made by a deceased owner, are admissible in evidence against such owners' privies. *Pike v. Hayes*, 171.
5. STATEMENTS MADE BY A MARRIED WOMAN AS TO THE BOUNDARY LINES of land owned by her, are not presumed to have been made under her husband's coercion, and are admissible in evidence, especially when repeated after his death. *Id.*

BURDEN OF PROOF.

See SPECIFIC PERFORMANCE; WILLS, 3, 9.

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See OFFICES AND OFFICERS.

CASE.

See PLEADING AND PRACTICE, 1.

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See NEGOTIABLE INSTRUMENTS, 3.

CHARTERS.

See STREETS, 1; SUBSCRIPTION.

CHOSES IN ACTION.

See ASSIGNMENTS OF CONTRACTS; HUSBAND AND WIFE, 7-11.

COMMON CARRIERS.

1. COMMON CARRIER MAY, BY SPECIAL CONTRACT, limit his common law liability. *Bingham v. Rogers*, 581.
2. ONE WHO SENDS GOODS BY A CARRIER MUST PROVE THEIR VALUE by other testimony than his own oath, in an action brought by him for their loss. *Id.*
3. COMMON CARRIER CONTRACTING TO DELIVER GOODS AT A CERTAIN PLACE is liable for them after they have been delivered at an intermediate point to another carrier to forward to their destination, and the words "with privilege of reshipping" contained in the bill of lading do not release his liability for their loss in the hands of such second carrier. *Little v. Semple*, 123.
4. COMMON CARRIERS ARE LIABLE FOR ALL LOSSES EXCEPT those which have occurred by inevitable accident resulting from the act of God or from the public enemies of the country. *Gilmore v. Carman*, 96.
5. OWNERS OF STREAMBOATS ARE COMMON CARRIERS where they engage in carrying trade on navigable rivers, and transport merchandise or other articles from one port to another for a price or compensation. *Id.*
6. LOSS BY FIRE OTHER THAN FROM LIGHTNING is not within the exception of the act of God, and is chargeable upon the common carrier. *Id.*
7. "DANGERS OF THE RIVER ONLY EXCEPTED," IN A BILL OF LADING, will not release the liability of common carriers for loss by fire. *Id.*
8. COMMON CARRIER IS BOUND TO RECEIVE AND CARRY GOODS only where offered by their owner or his authorized agent, and only upon prepayment of the freight, if required. *Fitch v. Newberry*, 33.
9. COMMON CARRIER WHO HAS RECEIVED GOODS WITHOUT THE CONSENT of the owner, express or implied, to their delivery, can not detain them against the latter for transportation charges. *Id.*
10. NO LIEN EXISTS FOR FREIGHT IN FAVOR OF A CARRIER unless the relation of debtor and creditor exists between the owner and carrier, so that an action at law might be sustained for the recovery of the freight. *Id.*
11. CARRIER ENTRUSTED WITH GOODS CAN NOT, BY TRANSFERRING them to another carrier for transportation to the designated point, confer upon the latter a right to freight as against the owner of the goods. *Id.*
12. NO SPECIAL CONTRACT WITH COMMON CARRIER IS NECESSARY to subject him to all the liabilities as such to the person applying; because the undertaking of a common carrier is general and embraces every one in the community, and to make it particular as an undertaking with a single individual it is only necessary to apply with the goods to the carrier. *Doty v. Strong*, 773.
13. COMMON CARRIERS ARE LIABLE FOR REFUSING TO CARRY GOODS when properly requested, as well as for negligent carrying, or failure to carry, after the goods have been delivered to them. *Id.*

14. DELIVERY TO AND ACCEPTANCE BY CARRIER NEED NOT BE PROVED in an action against him for a refusal to receive and carry the goods. *Id.*
15. COMMON CARRIERS, DEFINITION OF.—Common carriers are persons who undertake for hire or reward to transport the goods of such as choose to employ them from place to place. *Id.*
16. TO PROVE THAT DEFENDANTS ARE COMMON CARRIERS, an advertisement in the public newspapers, notifying the public that they had undertaken the business of common carriers, is legal and proper evidence. *Id.*
17. COMMON CARRIER IS NOT EXCUSED for refusing to transport goods, by the fact that no freight boats passed between the points of transportation; though the fact that no boats could possibly pass would excuse him. *Id.*

CONCEALMENT.

See FRAUD, 1; INSURANCE—FIRE, 2-3.

CONDITIONAL SALE.

See SALES, 1, 7.

CONSIGNORS.

See SHIPPING, 1.

CONSPIRACY.

1. CONSPIRACY TO DO AN ACT WHICH WOULD BE INNOCENT if done by an individual, may be indictable if the act amounts to a private wrong or a public mischief. *Mifflin v. Commonwealth*, 527.
2. CONSPIRACY TO EFFECT ESCAPE OF FEMALE INFANT with a view to her marriage against her father's will is indictable. *Id.*

CONSTABLES.

See AGENCY, 3, 4.

CONSTITUTIONAL LAW.

1. DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, upon questions arising under the constitution, laws, and treaties of the United States, will be followed in this court; but in questions of local law, and in construing the constitution and statutes of this state, the decisions of the courts of this state will be followed in preference to those of the United States. On questions of commercial law, uniformity of decision between the different state and national courts is highly desirable. *Stalker v. McDonald*, 389.
2. *CODDINGTON v. BAY*, 11 AM. DEC. 342, examined and approved. *Id.*
3. COURT CAN NOT PRONOUNCE ACT OF LEGISLATURE VOID for any supposed inequality or injustice in its intention or operation, if the act relate to a subject-matter within the scope of legislative authority and the provisions of the law be general. *Armington v. Barnet*, 705.
4. DECISIONS OF COURTS OF THE UNITED STATES ARE OF PARAMOUNT AUTHORITY, where the point to be determined is whether a state law contravenes any provisions of the national constitution. *Id.*
5. STATUTE IS CONSTITUTIONAL THAT AUTHORIZES THE CONDEMNATION OF THE FRANCHISE or easement of a turnpike corporation, where the public

good requires a public highway over such easement, or the land in which it exists. *Id.*

8. PHRASE "BY THE LAW OF THE LAND" means according to the course of the common law; and the words "due process of law" mean a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. *Taylor v. Porter*, 274.
7. ONE STATE OF THIS UNION MAY SUE IN THE COURTS of any other state thereof. *State v. Woram*, 378.
8. LEGISLATURE CAN EXERCISE SUCH POWERS ONLY AS HAVE BEEN DELEGATED to it, and when it goes beyond that limit its acts are utterly void. *Taylor v. Porter*, 274.
9. STATUTE OF 1824, REQUIRING A SHERIFF TO RECEIVE the notes of a bank in satisfaction of a judgment in favor of such bank, is constitutional. *Bank of Gallipolis v. Domigan*, 475.
10. OWNER OF LAND MAY CONSENT TO AN UNCONSTITUTIONAL LAW, and become bound by its provisions. The consent need not be in writing. It was, therefore, held that by bringing an action for damages awarded him under a statute authorizing the laying out of private roads, the land owner adopted the statute and removed all obstacles to its operation. *Baker v. Braman*, 387.
11. WHARFAGE EXACTED OF STEAMBOATS AND VESSELS BY OWNER OF SOIL for the use of it is not a tonnage duty, repugnant to the federal constitution. *O'Conley v. City of Natchez*, 87.
12. BILLS OF CREDIT.—Bonds or other paper issued by a state, but not intended nor adapted to circulate as money, are not bills of credit. *State of Indiana v. Woram*, 378.

See EMINENT DOMAIN; SUCCESSION, 3.

CONSTRUCTION.

See BOUNDARIES, 2; CONTRACTS, 1, 2; STATUTE OF FRAUDS, 7; SUCCESSION; WILLS, 19.

CONTRACTS.

1. CONSTRUCTION OF CONTRACT SHOULD BE GOVERNED BY THE INTENTION of the parties, as gathered from its terms. *Tindall vs. Den*, 220.
2. CONSTRUCTION OF AN INSTRUMENT DEPENDS UPON THE INTENTION of the parties, as collected from the whole instrument; if intended as a lease, it should be so construed. No artificial rule exists for deciding what is a lease. *State v. Page*, 608.
3. CONTRACTS OF ENLISTMENT are not governed by the same principles that regulate the validity of ordinary contracts. *U. S. v. Cottingham*, 710.
4. ACT OF CONGRESS OF MARCH 16, 1802, prescribing qualifications of soldiers enlisting in the army of the United States, was designed for the benefit of the government, and is in no part founded upon a supposed disability of the recruit to bind himself by his contract of enlistment. *Id.*
5. ALIEN VOLUNTARILY ENLISTING IN ARMY of the United States has no right to claim exemption from the consequences of his own voluntary engagement, and to be discharged from service on account of his alienage. *Id.*

6. VOLUNTARY ENLISTMENT IS NOT VOID because the recruit does not possess the qualifications prescribed by the act of congress of March 16, 1802; the act, in such a case, merely subjects the recruiting officer to punishment for his disregard of the legislative instructions. *Id.*
 7. IT IS NO JUST CAUSE FOR DISMISSION FROM SERVICE that a recruit has practiced an imposition upon the government in regard to his qualifications. *Id.*
 8. AGREEMENT TO PAY IN KIND, IF NOT DISCHARGED AT THE MATURITY OF THE OBLIGATION by a delivery of the goods, may be treated by the obligee as an agreement to pay in cash, and he may maintain a general action of *assumpsit* thereon. *Wainwright v. Straus*, 675.
 9. AGREEMENT TO PAY FOR SERVICES IN PROCURING PASSAGE OF PRIVATE ACT of the legislature for a party's benefit, is void as against public policy. *Clippinger v. Hepbaugh*, 519.
 10. ACTION CAN NOT BE MAINTAINED ON ILLEGAL CONTRACT, either to enforce it directly, or to recover back money paid on it after its execution. *Webb v. Fulehire*, 419.
 11. MEMBERS OF COMMITTEE OF POLITICAL MEETING, appointed to provide a free public dinner for the party, are personally liable for the bill. *Eckbaum v. Irons*, 540.
- See COMMON CARRIERS; DEEDS, 1; EQUITY, 11; INSANITY, 3, 4; MERGER; PARTNERSHIP, 1; SALES; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS.

CONVERSION.

See ABANDONMENT, 2; CO-TENANCY, 1; TRESPASS, 4.

CORPORATIONS.

1. JUDGMENT CREDITOR OF INSOLVENT CORPORATION OBTAINS NO PREFERENCE by filing a creditor's bill against it after the return of his execution unsatisfied, under the New York revised statutes, and the final decree obtained is not only for his benefit, but also for that of all other creditors who may prove their claims under it, or under any prior order, and the effects are to be distributed ratably among such creditors, giving no preferences except such as exist under the laws of the United States, or by virtue of liens or docketed judgments and decrees. *Morgan v. New York R. R. Co.*, 244.
2. JUDGMENT CREDITOR OF INSOLVENT CORPORATION MAY FILE EITHER BILL OR PETITION, under 2 N. Y. R. S. 463, sec. 36, after the return of his execution unsatisfied, to obtain a sequestration of its effects, and a bill is the proper mode of proceeding where he wishes to charge the directors and stockholders personally if the corporate property should be insufficient. *Id.*
3. STOCKHOLDERS OF INSOLVENT CORPORATION ARE LIABLE FOR ITS DEBTS, under the New York revised statutes, to the extent of what remains unpaid on their shares of capital stock, or of such proportion thereof as may be necessary to satisfy the debts, and a judgment creditor whose execution has been returned unsatisfied may compel a discovery of the names of such stockholders, and the amounts unpaid on their shares, and may then amend his bill so as to make them parties, or may, after a decree against the corporation and a distribution of its effects, file a supplemental bill against such stockholders. *Id.*

4. **RECEIVERSHIP OF INSOLVENT CORPORATION SHOULD EXTEND TO ALL ITS PROPERTY**, where a receiver is appointed on a bill filed by a judgment creditor, under the New York revised statutes; but the corporation can not complain of an order appointing a receiver of so much property only as is necessary to satisfy the complainant's debt, where it does not appear that there are any other debts. *Id.*
 5. **INJUNCTION DEPRIVING OFFICERS OF CORPORATION** of the control of all its property should not be granted, *ex parte*, on the certificate of a vice-chancellor or injunction master out of court. *Id.*
 6. **ORDER APPOINTING RECEIVER OF INSOLVENT CORPORATION** for the purpose of winding up its affairs, should contain a clause restraining its officers from collecting the debts or paying away or transferring the assets. *Id.*
 7. **CORPORATION HAS NO POWER TO PURCHASE OR DEAL IN STATE BONDS**, if it is incorporated to engage "in whale fishery and in the manufacture of oil and spermaceti candles;" but it was held in this case that it could not avoid its obligation given for such bonds. *State v. Woram*, 378.
 8. **THE WORD PERSON** may extend to corporations as well as natural persons. *Id.*
 9. **A STATE IS A CORPORATION**, and as such may be the payee of a note. *Id.*
 10. **LEGISLATURE MAY AUTHORIZE MUNICIPAL CORPORATION TO MAKE BY-LAWS** for local objects, such as the prevention of nuisances. *Tanner v. Trustees of Albion*, 337.
- See CONSTITUTIONAL LAW, 5; JUDGMENTS, 32, 33; NUISANCE; PLEADING AND PRACTICE, 8, 10; STREETS; SUBSCRIPTION.

COSTS.

1. **COSTS OF PROTEST MAY BE PROPERLY ALLOWED** in the statutory action for money had and received on a bill of exchange, without an averment of protest. *Lewis v. Bank of Kentucky*, 469.
2. **NOTARIAL CERTIFICATE OF PROTEST IS EVIDENCE** of the costs thereof. *Id.*
3. **ASSIGNEE MAY RECOVER FROM HIS ASSIGNOR** the costs expended by him in the prosecution of an unfounded claim, falsely represented by the latter to be valid. *Cartwright v. Carpenter*, 66.

See SPECIFIC PERFORMANCE; WILLS, 6.

CO-TENANCY.

1. **CO-TENANT SELLING THE ENTIRE PROPERTY DOES NOT VEST** in the purchaser any more than his own interest. The other co-tenant may so consider it, and take the property when opportunity offers; or he may sue in trover for the conversion, and thereby vest in the purchaser the entire property. *Rains v. McNairy*, 651.
2. **SHERIFF, UNDER FI. FA. AGAINST ONE CO-TENANT**, levying on and selling their joint property, is liable to an action by the other co-tenant. *Id.*
3. **TO THE MAINTENANCE OF AN ACTION OF TROVER BY ONE TENANT IN COMMON** of a chattel against the other, a destruction of the property by the latter is essential. *Sanborn v. Morrill*, 701.
4. **SALE OF CHATTEL BY ONE TENANT IN COMMON** is not such a destruction of the property as will authorize an action of trover by the other. In such case the other tenant may either disaffirm the sale and stand as co-tenant

with the purchaser, or else affirm it, and call the seller to an accounting for the proceeds. *Id.*

See ATTACHMENTS, 1, 2; HUSBAND AND WIFE, 6; PARTITION.

COURT MARTIAL.

See JUDGMENTS, 9.

COVENANTS.

1. COVENANTS FOR QUIET ENJOYMENT RUN WITH THE LAND, and pass to a purchaser by a quitclaim deed from the grantee. *Hunt v. Amidon*, 283.
2. GRANTEE OF LAND UNDER DEED WITH COVENANT FOR QUIET ENJOYMENT has no right to give it up voluntarily to a stranger who claims by title paramount, nor even to pay off an alleged incumbrance, without suit, and then resort to his action upon the covenant. *Id.*
3. INDEPENDENT COVENANTS.—Where plaintiff takes a note for purchase money of lands, and defendant takes a penal bond that a lawful title be given him, which are wholly independent and disconnected, each has an action on his own security for the non-performance of the other party, and performance on one side is not a condition precedent to performance on the other. *Martin ad. Bobo*, 587.

See AGENCY, 2; DAMAGES; DEEDS, 1; EQUITY, 8, 10; FRAUD, 1; JUDGMENTS, 11, 13; MERGER.

CREDITORS' BILLS.

See CORPORATIONS.

CRIMINAL LAW.

1. RIDING OR GOING ABOUT ARMED with unusual and dangerous weapons, to the terror of the people, is an offense at the common law. The statute of Northampton, 2 Edw. III., c. 3, was merely an affirmation of the common law. *State v. Huntly*, 416.
 2. DECLARATIONS OF DEFENDANT OF HIS INTENT TO KILL or injure a certain person are admissible under an indictment charging him with going about armed, with intent to do injury, as a part of the offense. *Id.*
 3. GUN IS AN UNUSUAL WEAPON wherewith to be armed and clad, and it is an offense to carry one with evil intent; though citizens are at liberty to carry them for any lawful purpose. *Id.*
 4. ONE CAN NOT BE INDICTED FOR MAKING REPRESENTATIONS which, though false, could not have misled the person to whom they were made, had he exercised common prudence and caution. *People v. Williams*, 258.
 5. ACCOMPLICE, WHO GIVES TESTIMONY FAIRLY AND OPENLY, has no right to demand from the court in which he is tried for the same offense, a recommendation to the executive for a pardon. *Commonwealth v. Dabney*, 717.
- DOCTRINE OF APPROVEMENT DOES NOT PREVAIL in this state. *Id.*

See CONSPIRACY.

CRUELTY.

See MARRIAGE AND DIVORCE, 1.

DAMAGES.

1. QUESTION AS TO QUANTUM OF DAMAGES CAN NOT BE RAISED BY MOTION FOR NONSUIT so as to bring it up on error, if the plaintiff is entitled at least to nominal damages. *Lillie v. Hoyt*, 380.
 2. MEASURE OF DAMAGES IN ACTION FOR BREACH OF COVENANT against incumbrances, is the amount of the purchase money, with interest thereon from the time when the vendee ceased to be in perception of the profits, actual or potential. *Patterson v. Stewart*, 586.
 3. MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF TITLE is the consideration price with interest, and not the value of the land at the time of eviction. *Elliott v. Thompson*, 630.
 4. MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF SOUNDNESS on the sale of a horse, is the difference between his value at the time of the sale, supposing him to be sound, and his value with the defect complained of; and a charge to the jury that the true measure of damages, in such a case, is the difference between the price paid, and the value with the defects, is erroneous. *Cary v. Gruman*, 299.
 5. MEASURE OF DAMAGES FOR VENDOR'S FRAUDULENT MISREPRESENTATIONS as to the condition and situation of the land sold, is the difference between the contract price and the actual value at the time of sale. *Van Eppe v. Harrison*, 314.
- See ANIMALS; INDEMNITY, 2; PLEADING AND PRACTICE, 1; SET-OFF, 6, 7, 9.

DANGERS OF THE RIVER.

See COMMON CARRIERS, 7.

DANGERS OF THE SEA.

See SHIPPING, 2.

DEBT.

See ESTATES OF DECEASED PERSONS, 5; PLEADING AND PRACTICE, 2; WILLS, 25.

DECLARATIONS.

See EVIDENCE, 3, 4, 8, 9.

DECREE.

See JUDGMENTS; PLEADING AND PRACTICE, 13.

DEDICATION.

1. NO PARTICULAR FORM OF DEDICATION IS NECESSARY, nor is it essential to its validity, that the land should be in the actual use or occupation of the public. *Dummer ad. Den*, 213.
2. LAND IS SUFFICIENTLY DEDICATED when the owner of a tract which has been mapped out as a city, marks it on the map as public land reserved from sale, and it is regarded by the public and the grantor as reserved for a public market-place, though it is partly under water and has not been used by the public. *Id.*
3. DEDICATION OF LAND DOES NOT CARRY THE FEE where the public could enjoy the premises for the purposes intended as fully without as with it. *Id.*

4. WHERE A PARTY CONVEYS LAND DEDICATED TO THE PUBLIC, the fee to the land passes, subject to the legal right vested in the public to the possession and use of the land. *Id.*
5. OWNER MAY DEDICATE LAND TO PUBLIC USE BY ANY ACT sufficiently evincing his intent without a previous adverse user, and may also, it seems, restrict the enjoyment to particular seasons. *Gowen v. Philadelphia Exchange Co.*, 489.
6. LEAVING LAND ADJOINING STREET, OPEN FOR OWNER'S CONVENIENCE, IS NO DEDICATION, but a mere revocable license to the public to use it as a foot-way. *Id.*

See EJECTMENT, 2.

DEEDS.

1. CONTRACT TO DELIVER A "GOOD AND SUFFICIENT DEED, with covenants of warranty," will be held to mean a good and sufficient title, when it appears from the agreement and the attendant circumstances that such was the intention of the parties. *Tindall ad. Den*, 220.
2. DEFENDANT ADMITS PLAINTIFF'S TITLE BY EXECUTION OF SUCH AGREEMENT, and can not afterwards deny it; and the plaintiff is not bound to produce further evidence of title than the agreement. *Id.*
3. PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN DESCRIPTION IN A DEED in order to apply it to the subject-matter of the grant. *Doe v. Jackson*, 107.
4. ADDITION OF FALSE OR MISTAKEN DESCRIPTIONS in a deed will not frustrate the grant, if there are others sufficiently clear to identify the thing intended to be granted. *Id.*
5. CONVEYANCE NEVER RECORDED IS EFFECTUAL to vest the title in the grantee as against the grantor, though afterwards lost or destroyed; and when followed by a long and uninterrupted possession, it furnishes a sufficient presumption against any claim of the grantor's creditors. *Wade v. Greenwood*, 759.
6. WHERE A DEED HAS BEEN LOST, the execution of another will be decreed. *Id.*

See AGENCY, 2; BONA FIDE PURCHASERS, 4; BOUNDARIES, 1-3; COVENANTS, 2; MERGER; NAMES; PARTNERSHIP, 4-7; SPECIFIC PERFORMANCE.

DEFAULT.

See PLEADING AND PRACTICE, 29.

DEFINITIONS.

See COMMON CARRIERS, 15; CONSTITUTIONAL LAW, 6.

DELIVERY.

See COMMON CARRIERS, 14; SALES, 3-7; SHIPPING, 2.

DEMAND.

See AGENCY, 6; BANKS AND BANKING, 2, 3; NEGOTIABLE INSTRUMENTS; SURETYSHIP, 8.

DEMURRER.

See PLEADING AND PRACTICE, 8, 29; SET-OFF, 5.

DEPOSITIONS.

See EVIDENCE, 10, 11.

DESCRIPTIONS.

See BOUNDARIES; DEEDS, 3, 4; EXECUTIONS, 1, 2.

DEVISES.

See WILLS.

DISHONOR.

See NEGOTIABLE INSTRUMENTS.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

RELINQUISHMENT OF DOWER BY AN INFANT FEME COVERT is not binding upon her; and may be avoided after the death of her husband, without repaying any part of the purchase money paid to her husband by his vendee. *Markham v. Merrett*, 76.

See PARTNERSHIP, 3.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 6.

EASEMENTS.

See ADVERSE POSSESSION, 2; CONSTITUTIONAL LAW, 5.

EJECTMENT.

1. **EJECTMENT MAY BE MAINTAINED AGAINST OWNER OF FEE** when the plaintiff is entitled to the possession of the premises. *Dummer ad. Den*, 213.
2. **EJECTMENT MAY BE MAINTAINED FOR LAND DEDICATED TO THE PUBLIC** before the passage of an ordinance appropriating the land for the purpose specified. *Id.*
3. **DEPENDANT IN EJECTMENT IS ESTOPPED TO DENY PLAINTIFF'S TITLE** when he has once admitted it, without fraud practiced upon him. *Tindall ad. Den*, 220.

See INJUNCTIONS, 2.

ELECTIONS.

1. **ELECTIONS ARE NOT GAMES WITHIN THE MEANING OF THE STATUTE** against games and gambling devices. *Hickerson v. Benson*, 115.
2. **BETS, PREVIOUS TO AN ELECTION, UPON ITS EVENT, OR MADE SUBSEQUENTLY** upon matter connected with the canvass, are illegal and void, upon principles of public policy and morality. *Id.*
3. **BETS ON ELECTIONS CAN NOT BE DETERMINED AT LAW**; the courts leave the parties as they find them, unless the party rescind the contract before the event is known upon which the wager depends. In the event of such rescission, the party rescinding may recover the amount which he wagered. *Id.*

4. **BETS ON ELECTIONS.**—The rule that a person may declare his dissent from an illegal wager before the event happens, and recover back his money, does not apply if the relative condition and chance of the two parties is materially changed, or the value of the risk is greatly altered; then the rule *potior conditio defendentis* prevails. *Id.*
5. **MONEY VOLUNTARILY PAID UNDER VOID CONTRACT** can not be recovered back. And therefore, the creditor of one who lost money on an election bet and paid it over to the loser, can not recover it back, by means of a foreign attachment. *Speise v. McCoy*, 579.

EMINENT DOMAIN.

1. **PRIVATE PROPERTY CAN NOT BE TAKEN FOR A PRIVATE PURPOSE**, without consent of the owner. *Taylor v. Porter*, 274.
2. **PRIVATE ROAD CAN NOT BE LAID OUT WITHOUT THE CONSENT** of the owner of the land over which it passes, and a statute which authorizes a private road to be laid out over the land of a person, without his consent, is unconstitutional and void. *Nelson, C. J.*, dissenting. *Id.*
3. **GENERAL GRANT OF LEGISLATIVE POWER DOES NOT AUTHORIZE** the legislature to take the property of one person and give it to another, either with or without compensation. *Id.*
4. **WHERE LANDS ARE TO BE TAKEN UNDER STATUTE AUTHORITY**, in derogation of the common law, every requisite of the statute having the semblance of benefit to the owner must be strictly complied with. *Sharp v. Johnson*, 259.

ENLISTMENT.

See CONTRACTS, 3-7.

EQUITY.

1. **EQUITY IS ANCILLARY TO LAW IN AIDING CREDITORS** by judgment and execution in our own courts, where it is necessary for their satisfaction. *McLure v. Bence*, 437.
2. **EQUITY WILL NOT INTERPOSE TO AID CREDITORS** by a foreign judgment on the ground of necessity, where the necessity arises from a defect in the law of the country to which all the parties belong. *Id.*
3. **BILL IS NOT MULTIFARIOUS** in which all the complainants are creditors of the same party, and seeking to subject the same fund to their claims. *Comstock v. Rayford*, 102.
4. **CREDITOR MAY, WITHOUT A JUDGMENT AT LAW**, have a fraudulent sale set aside under the Mississippi statute: *How. & Hutch.* 520. *Id.*
5. **NON-RESIDENTS MAY MAINTAIN A SUIT IN CHANCERY** against non-resident defendants, provided there is one resident defendant. *Id.*
6. **CHANCERY HAS NO JURISDICTION OVER PERSONS OF NON-RESIDENT DEFENDANTS**, nor over their property within the state, unless given by statute, when there has been no previous judgment at law within the state. *Zecharie v. Bowers*, 111.
7. **JURISDICTION OVER THE LAND OF NON-RESIDENT DEFENDANTS**, situate within the state of Mississippi, has been given in equity by statute before obtaining a judgment at law. *Id.*
8. **CHANCERY WILL GRANT RELIEF TO A DEFRAUDED VENDEE** upon a covenant of seisin in the deed, if the vendor is utterly insolvent. *Ingram v. Morgan*, 626.

9. EQUITY PRIOR IN POINT OF TIME MUST PREVAIL in point of right. *Id.*
 10. EQUITY WILL NOT GRANT RELIEF TO VENDEE IN POSSESSION, with covenants of warranty, in the absence of fraud or eviction, but will grant such relief when the vendor or his personal representatives have agreed to an abatement in the purchase price. *Elliott v. Thompson*, 630.
 11. EQUITY WILL NOT INTERFERE TO RESTRAIN THE BREACH OF A CONTRACT or to redress it, where the remedy at law is adequate. *Smith v. Pettigill*, 667.
- See CORPORATIONS; IMPROVEMENTS; MORTGAGES; PARTITION, 1, 2; SET-OFF; SPECIFIC PERFORMANCE.

ESTATES OF DECEASED PERSONS.

1. ADMINISTRATION OF AN ESTATE AS INSOLVENT IS GOOD, although the same afterwards turns out to be solvent. *Ticknor v. Harris*, 186.
2. LEGATEES CAN NOT BE COMPELLED TO REFUND TO AN EXECUTOR where he, mistaking the value of the assets, voluntarily paid them their legacies, there being no creditors of the decedent, but his estate turning out inadequate for the payment of the legacies. *Davis v. Newman*, 764.
3. LEGATEES WHO HAVE BEEN PAID THEIR LEGACIES are bound to refund a ratable part thereof, if debts are presented to the executor or administrator, more than sufficient to exhaust the residuum after such legacies have been paid. *Ticknor v. Harris*, 186.
4. REMEDY AGAINST THE LEGATEES IS CUT OFF by failing to present the claim to the commissioner within the time limited by statute, notwithstanding such claim depends upon a contingency which has not happened. *Id.*
5. ACTION OF DEBT ON A CLAIM AGAINST A DECEASED DEBTOR should not be brought against the heirs and devisees jointly, if the heirs take nothing by descent. *Id.*
6. WHETHER A CREDITOR, WHOSE CLAIM DEPENDED UPON A CONTINGENCY, can in any case come into equity to enforce payment against legatees who have received their legacies, *quære*. *Id.*
7. LEGACIES ARE REACHED, FOR THE PAYMENT OF DEBTS, through the executor or administrator, by the latter's retaining the same until the debts are paid. *Id.*

See BONDS, 3; PLEADING AND PRACTICE, 22; WILLS, 27, 28.

ESTOPPEL.

1. ONE WHO IS PRESENT AND SEES ANOTHER SELL PROPERTY to which the former has title, without objecting to such sale or disclosing such title, may be estopped by his silence from setting up his title. To work such estoppel it must appear that the sale was made with full knowledge on the part of the owner. *Watkins v. Peck*, 156.
2. PARTY IS NOT ESTOPPED FROM ASSERTING HIS TITLE by reason of his presence at a sale without having made any objection, unless the subject-matter of the sale is something in which his interest is direct and immediate. If his interest depends upon an intermediate interest which is not affected by the sale, he can not be estopped. *Id.*

See ASSIGNMENT OF CONTRACTS, 3; EJECTMENT, 3; LANDLORD AND TENANT, 1; PARTITION, 3; PLEADING AND PRACTICE, 26, 27.

EVICTION.

See MORTGAGES.

EVIDENCE.

1. COURTS WILL TAKE JUDICIAL NOTICE OF THE EXISTENCE OF CORPORATIONS formed under the laws of their own state, but not of foreign corporations. *Lewis v. Bank of Kentucky*, 469.
 2. TESTIMONY OF A JUDGE THAT THE COURT VERBALLY ORDERED an act to be done, is inadmissible; the records of the court are the evidence of its official acts. *Medlin v. Platte Co.*, 135.
 3. DECLARATIONS OF A PARTY TO THE RECORD ARE ADMISSIBLE, if against his interest, although he appear to be only trustee for a third person. *Tenney v. Evans*, 194.
 4. DECLARATIONS OF A GUARDIAN CONCERNING THE OWNERSHIP of property purchased by him, made at the time of such purchase, are admissible in evidence as part of the *res gesta*. *Id.*
 5. PERSONAL PROPERTY ON THE LAND OF A WARD, purchased and placed there by his guardian, must, *prima facie*, be considered as the ward's. Such presumption may be overcome by evidence, and to that end the declarations of the guardian, as indicating his intention, may be given in evidence. *Id.*
 6. THE POST-MARK UPON AN ENVELOPE IS NOT CONCLUSIVE EVIDENCE of the time of its deposit in the post-office; it may be shown that the deposit was made at a time different from that which the post-mark would indicate. *Ellis v. Commercial Bank*, 63.
 7. MEDICAL TESTIMONY SHOULD BE GIVEN WITH GREAT CARE and received with the utmost caution, and unless sustained by reasons drawn from facts, is entitled to little weight. *Clark v. State*, 481.
 8. DECLARATIONS OF FORMER OWNER RESPECTING HIS INTEREST are generally admissible against those claiming under him by title subsequent; but his declarations after parting with his interest, or which are overreached by the purchase of one claiming under him, are not admissible; as where the declarations are made after the docketing of a judgment against such former owner, and are offered in evidence against a subsequent purchaser under the judgment. *Padgett v. Lawrence*, 232.
 9. DECLARATIONS OF THIRD PERSON RESPECTING TITLE to land are not admissible to establish or destroy the title, or to prove or disprove a trust in the land, unless made in the presence of the holder of the legal title, and expressly or tacitly assented to by him. *Id.*
 10. DEPOSITION OR WITNESS SHOULD BE OBJECTED TO AT TIME of offering to read the deposition or swear the witness; if once admitted, the court can not take either from the jury by instruction. *Doty v. Strong*, 773.
 11. TIME OF RETURNING A DEPOSITION INTO COURT is not limited by any rule of court or of law; and the fact that it was not returned for two months after it was taken, and then but four days before the trial, is no objection to its admission. *Id.*
- See ADVERSE POSSESSION; ALTERATION OF INSTRUMENTS; BOUNDARIES, 4, 5; COMMON CARRIERS, 16; COSTS, 2; CRIMINAL LAW, 2, 5; INSANITY; JUDGMENTS, 1, 11-14, 18; JURY AND JURORS, 1; NEGOTIABLE INSTRUMENTS, 7; NEW TRIAL; PLEADING AND PRACTICE, 23; SALES, 1, 8; USAGE; WILLS, 2, 9.

EXECUTIONS.

1. **LEVY IS VOID FOR UNCERTAINTY, IN THE WORDS,** "Levied this execution on three tracts of land; one tract containing three hundred acres, one tract forty or fifty acres, one other tract containing one hundred and ten acres, as the property of Haywood Cozart, all in the county of Carroll. See advertisement in newspapers for description." *Taylor v. Cozart*, 855.
2. **DESCRIBING LAND LEVIED UPON BY MERELY REFERRING TO ADVERTISEMENT** in paper is not sufficient, and the levy is void for uncertainty; *aliter*, if the reference had been to a deed of record, or facts on the ground capable of proof. *Id.*
3. **PERSON MAY CLOSE OUTER DOOR OF HIS HOUSE AGAINST SHERIFF** who comes with an execution, at the suit of a private person, to seize his goods therein; and the fact that the defendant in the execution was not in the house at the time the sheriff entered does not alter his rights. *Curtis v. Hubbard*, 292.
4. **SHERIFF WHO ENTERS HOUSE IN VIOLATION OF LAW** is not justified in seizing the owner's goods therein, where such entry and seizure constitute one continuous act. *Id.*
5. **LEVY UNDER EXECUTION UPON THE PROPERTY** of one of the defendants in a joint judgment is *prima facie* a satisfaction thereof. *Kershaw v. Merchants' Bank*, 70.
6. **RIGHT OF ACTION ACCRUES UPON THE LEVY UPON THE PROPERTY** of one defendant in a joint judgment against his co-defendant, in the same manner as if he had satisfied and discharged the judgment by a payment in money. *Id.*
7. **SHERIFF IS NOT LIABLE FOR CASUAL LOSS OF GOODS BY FIRE** after a seizure on execution, though he leaves them with the debtor, taking a receipt from a friend of the latter promising to deliver them on demand or to pay the amount of the execution. *Contra*, COWEN, J. *Browning v. Hanford*, 369.
8. **RECEIPTOR OF GOODS SEIZED ON EXECUTION IS ORDINARY BAILEE** only, and is not liable as an insurer, even though he be the debtor or a friend of the debtor, unless his contract is very special and explicit. *Contra*, COWEN, J. *Id.*
9. **POWER OF SHERIFF TO EXACT INDEMNITY FROM RECEIPTOR** beyond his own liability to the creditor denied by NELSON, C. J., and BRONSON, J. *Id.*
10. **RETURN OF A SHERIFF, SHOWING DUE EXECUTION** of a *feri facias*, can not be disputed on a motion to amend such officer. The faithful discharge of the sheriff's obligations can only be inquired into in an action for a false return. *Bank of Gallipolis v. Domigan*, 475.
11. **IRREGULARITY IN EXECUTION SALE CAN BE TAKEN ADVANTAGE OF** only by the owner of the property and those claiming under him. *Hollowell v. Skinner*, 431.
12. **PURCHASER AT SHERIFF'S SALE IS ENTITLED TO RENT** of premises from the day of his purchase. *Snyder ada. Riley*, 602.
13. **TENANT, WITH NOTICE OF SHERIFF'S SALE OF PREMISES**, voluntarily paying rent, accruing since the sale, to prior landlord, is not thereby discharged from paying such rent to the purchaser. *Id.*
14. **PAYMENT TO THE ATTORNEY OF THE PLAINTIFF IN EXECUTION** discharges the sheriff who has collected money under the execution; unless he has

- been notified by the plaintiff that he has changed his attorney, or that the money is not to be paid to him. *Butler v. Jones*, 82.
15. **PARTY LOSES RIGHT OF REDEMPTION** of property sold under execution, though the vendee purchases with the object and under a parol agreement to permit the execution debtor to redeem, when the latter, after being in possession for some time, executes a covenant to abandon all possession or right to possession of the land. *Combs v. Little*, 207.
 16. **RIGHT OF REDEMPTION OF LAND SOLD UNDER EXECUTION** exists where the land is sold at a low figure, and others do not bid because it was understood that the purchaser was buying it for the execution debtor. *Id.*
 17. **PURCHASER AT EXECUTION SALE MUST RELY FOR TITLE ON THE WRIT** on which the sale was made. Though the officer had, at the time of the sale, other and senior writs in his hands against the defendant, the purchaser can not invoke their lien. His title is, however, good against the plaintiffs in such senior writs, and their remedy is against the sheriff. *McKey v. Garth*, 725.
 18. **TO ISSUE A SECOND FI. FA. BEFORE THE RETURN OF THE FIRST** is irregular, but does not render the second *f. fa.* void. *State v. Page*, 608.
- See **AGENCY**, 7; **ATTACHMENTS**, 2; **BONDS**, 3; **CORPORATIONS**, 1, 2; **COTENANCY**, 2; **HUSBAND AND WIFE**, 3; **JUDGMENTS**, 32, 33; **LANDLORD AND TENANT**, 7.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTOR OR ADMINISTRATOR, AT COMMON LAW, could not sell the real estate of the deceased for the payment of his debts unless expressly charged for that purpose.** Such real estate descended to the heir of the deceased. *Ticknor v. Harris*, 186.
2. **ADMINISTRATOR'S SALE OF PERSONALTY SHOULD BE ON DAY PRESCRIBED** in the order of sale; but the order does not entirely exclude discretion on the part of the administrator; and if circumstances justify it, he will be warranted in postponing the sale. *Lamb v. Lamb*, 618.
3. **WHERE SALE IS POSTPONED BY ADMINISTRATOR** to a different date from that prescribed in the order of sale, it is incumbent on him to show that he exercised a sound discretion, and acted with a view to the best interests of all the parties. *Id.*
4. **ADMINISTRATOR HIRING OUT PROPERTY WITHOUT TAKING SECURITY** except the note of the person to whom it is hired, is liable for the loss sustained in consequence. *Id.*
5. **FRAUD IN AN ADMINISTRATOR, tending to defeat the ends of his trust, renders his acts void, and they will be set aside at the instance of any party in interest, where the application has been made at the earliest opportunity, and before any rights have accrued to innocent third parties.** *Planters' Bk. v. Neely*, 51.
6. **IDEM.—PURCHASER AT AN ADMINISTRATOR'S SALE, before he has paid the amount of his bid, has acquired no right which will prevent a court from setting aside the sale, where, owing to the fraudulent devices of the administrator, he has been enabled to bid in the property at much below its real value.** *Id.*
7. **ATTEMPT OF ADMINISTRATOR TO SECURE THE PROPERTY** to the family of the decedent at an under-price, by discouraging bidding at his sale thereof, is fraudulent; and if so far successful, that at such sale the property is

bid in trust for the family at much below its value, the sale will be set aside at the instance of any creditor of the estate to whom damage is thereby threatened. *Id.*

8. EXECUTORS INVESTING IN UNITED STATES BANK STOCK moneys which they are directed by the will to put "on interest to be well secured," and to pay the interest annually to the testator's wife during life, the principal to go to his children, are liable to the legatees over for a loss of the sum so invested, by the depreciation of the stock, with legal interest thereon from the time the legatees became entitled. *Nyce's Estate*, 498.
 9. GUARDIAN OF INFANT LEGATEES EXPRESSING FAVORABLE OPINION OF INVESTMENT by executors in bank stock, of moneys to which the infants are entitled, does not thereby agree that the moneys shall be so invested, so as to debar his wards from holding the executors liable for a loss by depreciation. *Id.*
 10. STATUTORY CONSTRUCTION.—COMPENSATION OF AN EXECUTOR OR ADMINISTRATOR MUST BE DETERMINED BY REFERENCE to the value of the estate administered upon, where part thereof may have escaped appraisement, notwithstanding the statutory direction that such compensation shall be a percentage upon the appraised value of the estate. *Merrill v. Moore*, 60.
 11. TIME OF ALLOWANCE OF COMPENSATION to an executor or administrator should be upon the final settlement of the estate. *Id.*
 12. PURCHASE BY AGENT OF AN ADMINISTRATRIX, FROM HIS PRINCIPAL, where he is shown to have practically conducted and had control of the administration, does not bind the beneficiaries, and they may have such sale set aside on repayment of the purchase money with interest, and the purchaser compelled to account for the rents and profits. *Buckles v. Lafferty*, 752.
- See ESTATES OF DECEASED PERSONS; PLEADING AND PRACTICE, 22.

EXPERTS.

See INSANITY, 1, 2; EVIDENCE, 7.

FACTORS.

1. FACTOR HAS LIEN OR RIGHT OF RETENTION FOR GENERAL BALANCE due from his principal, on the property in his hands. *Knapp v. Alvord*, 241.
2. FACTOR WHO TAKES NOTES IN HIS OWN NAME for goods of his principal, and discounts them for his own accommodation, makes them his own, and will be liable to the principal for the amount of the sales, in the event of the insolvency of the purchaser. *Myers v. Entriken*, 538.

FALSE IMPRISONMENT.

ACTION FOR FALSE IMPRISONMENT IS IN ITS NATURE TRANSITORY, and the courts of this state have jurisdiction of such an action, brought to recover damages for an arrest under a warrant issued to enforce the collection of an illegal tax of another state. *Henry v. Sargeant*, 146.

FALSE REPRESENTATIONS.

See COSTS, 3; CRIMINAL LAW, 4; DAMAGES, 5; FRAUD, 2; NEGOTIABLE INSTRUMENTS, 5; SET-OFF, 7, 8;

FEE SIMPLE.

See DEDICATION, 3, 4.

FEME COVERT.

See MARRIED WOMEN; STATUTE OF LIMITATIONS, 6, 8.

FERRIES.

1. FERRY IS AN INCORPOREAL HEREDITAMENT acquired from the public, either by special act of the legislature, or by some other competent authority, under the provisions of a general law. It includes the exclusive privilege of transportation, for tolls, across a watercourse, and also the use, for that purpose, of the respective landings and their outlets. *Patrik v. Ruffners*, 740.
2. USE OF THE LANDINGS AND THEIR OUTLETS is a part of the ferry franchise. *Id.*
3. COMPLAINT IN ACTION FOR DISTURBANCE OF FERRY need not set forth the means by which the ferry was legally established, nor the derivation of plaintiff's title thereto. *Id.*
4. COMPLAINT IN ACTION FOR DISTURBANCE OF FERRY, BY INJURING THE LANDINGS AND THEIR OUTLETS, need not allege directly that plaintiff was possessed of them, or was owner of the soil, if it shows that they were used as appurtenant to the ferry. *Id.*
5. FERRY BEING ESTABLISHED IN A PUBLIC ROAD, the grantee is entitled to the use of the road for landings and outlets, appurtenant to the ferry. *ALLEN, J.*, dissenting. *Id.*
6. VALIDITY OF FERRY FRANCHISE can not be questioned collaterally, unless by parties who can show a right paramount to that granted by the public. *Id.*
7. OWNER OF FERRY MAY MAINTAIN AN ACTION FOR THE DISTURBANCE thereof against persons who, by obstructions in the river, cause injuries mediate or immediate to the landings, thereby diminishing the profits of the ferry, and subjecting the owner to increased labor and expense in the use of his franchise. *Id.*
8. COMPLAINT FOR DISTURBING THE ENJOYMENT OF A FERRY, sufficiency of, discussed by the judges. *Id.*

FIXTURES.

1. FIXTURES—AS BETWEEN VENDOR AND VENDEE, THE ANCIENT RULE, that whatever is affixed to the freehold passes with it, has not been relaxed. *Degraffenreid v. Scruggs*, 658.
2. GIN-MILL, AS BETWEEN VENDOR AND VENDEE, PASSES WITH HIS FREEHOLD, if erected in the gin-house and fastened to it by nails and braces. *Id.*

FORECLOSURE.

See MORTGAGES.

FOREIGN JUDGMENTS.

See JUDGMENTS, 16-24.

FRANCHISES.

See CONSTITUTIONAL LAW, 5; FERRIES

FRAUD.

1. SUPPRESSION OF DEFECTS OF TITLE BY VENDOR, who sells with full covenants of warranty, having only a bond for the title, is a fraud upon the vendee. *Ingram v. Morgan*, 628.
 2. PERSON WHOSE FALSE REPRESENTATIONS HAVE INDUCED ANOTHER to a certain line of conduct, is liable to the latter for the loss he has thereby incurred, and must make good such representations. *Carterright v. Carpenter*, 66.
- See ATTACHMENTS, 4, 5; COSTS, 3; CRIMINAL LAW, 4; DAMAGES, 5; EJECTMENT, 3; EXECUTORS AND ADMINISTRATORS, 5-7; INSANITY, 3, 4; INSURANCE—FIRE, 5; NEGOTIABLE INSTRUMENTS, 5, 6; SET-OFF, 7, 8; VENDOR AND VENDEE.

FRAUDULENT CONVEYANCES.

1. VOLUNTARY CONVEYANCE FROM FATHER TO SON IS VOID as to subsequent *bona fide* purchasers from the father without notice. *Freeman v. Bateman*, 444.
2. *IDEM*.—By the act of 27 Eliz., c. 4, a voluntary conveyance, though made for the purpose of providing for a wife or children, is void as against a subsequent purchaser, for a fair price, though with notice of the prior conveyance. *Id.*

See ATTACHMENTS, 4, 5; EQUITY, 4.

FREIGHT.

See COMMON CARRIERS, 8-11; SHIPPING, 2.

GAMING.

1. MONEY FAIRLY LOST AT PLAY at a forbidden game, and paid, can not be recovered back in an action for money had and received. *Webb v. Pitcher*, 419.
2. MONEY WON BY CHEATING at any kind of game, whether allowed or forbidden, or by means of jugglery, and paid by the loser without knowledge of the fraud, may be recovered back. *Id.*
3. BILL OF SALE OF GOODS LOST AT GAMBLING TABLE is absolutely void. Its assignment, unaccompanied by actual delivery of the goods, is no consideration for a note or check. *Hockaday ad. Willis*, 606.
4. ASSIGNEE'S WILLINGNESS TO RUN ALL RISKS, given upon receiving such bill of sale, would not make it a good consideration. *Id.*
5. IF POSSESSION OF THE GOODS WAS ACTUALLY GIVEN and there was a new contract, untainted by gaming, it would be a good consideration for the note and check. *Id.*
6. LOSER OF GOODS AT GAMING CAN NOT RECOVER THEM or their value from a *bona fide* purchaser. *Id.*
7. TITLE OF GOODS LOST AT PLAY AND PAID DOWN is good in the hands of the winner, even against the loser, after expiration of three months. *Id.*
8. IMMEDIATE PURCHASE OF GOODS LOST AT PLAY by the loser or a third person for him would be a palpable evasion of the statute. A note given by such purchaser would be a note given for money lost at play. *Id.*
9. MONEY OR PROPERTY LOST AT GAMING CAN NOT BE RECOVERED BACK, except by the express provisions of a statute. *Allen v. Dodd*, 632.

10. BET OR WAGER LOST, AND THE MONEY OR PROPERTY DELIVERED to the winner, courts will not aid in its recovery, both parties being equally derelict. *Id.*

See ELECTIONS; NUISANCE.

GIFTS.

- GIFT OF PERSONAL PROPERTY WILL BE PRESUMED when a father places it in the possession of his son and allows him to use it as his own for several years. *Hollowell v. Skinner*, 431.

See MARRIED WOMEN, 1.

GRANTS.

See ADVERSE POSSESSION; BOUNDARIES.

GUARDIAN AND WARD.

1. APPOINTMENT OF OBLIGOR IN BOND AS GUARDIAN of the infants to whom it has been conveyed by the obligee, does not extinguish the debt. *Wiborn v. Gorrell*, 456.
2. GUARDIAN MAY PURCHASE PROPERTY FOR HIS WARD, which will belong to him, if on arriving at age he accept the property and ratify the transaction. *Tenney v. Evans*, 194.
3. GUARDIAN CAN NOT PURCHASE PROPERTY AND PLACE IT ON THE LAND of his ward, to the injury of his creditors. *Id.*
4. GUARDIAN CAN NOT GRANT AN INCORPOREAL HEREDITAMENT out of the land of the ward. *Watkins v. Peck*, 156.

See EVIDENCE, 4, 5; EXECUTORS AND ADMINISTRATORS, 9; INFANCY, 3.

HIGHWAYS.

See CONSTITUTIONAL LAW, 5; FERRIES, 5; STREETS.

HOLIDAYS.

See SUNDAYS.

HUSBAND AND WIFE.

1. IN ORDER THAT MARITAL RIGHTS MAY ATTACH, it is necessary that the husband should take possession as husband, and as of his own property, and not as trustee. *Jackson v. McAlilly*, 620.
2. HUSBAND HOLDS PROPERTY AS TRUSTEE FOR WIFE when he takes possession of it under an order that it be vested in the wife, and that he execute proper trust deeds for it to the commissioner of the court. *Id.*
3. LIEN OF AN EXECUTION WILL NOT ATTACH on property which a husband holds as trustee. *Id.*
4. WHERE HUSBAND IS PERMITTED TO TAKE POSSESSION of wife's separate property by the commissioner, before he has made a trust deed to her, in pursuance of the order of court, it is not such a fraud on third persons that the property will be subject to execution against him, the wife having had no agency in the matter. *Id.*
5. HUSBAND IS NOT LIABLE TO AN ATTORNEY EMPLOYED BY HIS WIFE for services performed in resisting a petition for divorce preferred by the

former, or in prosecuting a similar petition for the latter. *Wing v. Hurt*, 695.

4. GRANT OF LAND TO A HUSBAND AND WIFE AND TO A THIRD PERSON, and their heirs, as tenants in common and not as joint tenants, conveys one moiety to the husband and wife, and the other moiety to the third person. *Johnson v. Hart*, 545.
7. ASSIGNMENT OF WIFE'S CHOSES IN ACTION MADE BY HUSBAND is effectual, if, at the time of the assignment, or afterwards during his life-time, he is in condition to reduce such choses into his possession. If, however, he dies before the event happens on which he is entitled to reduce the choses into possession, his assignment is inoperative. *Browning v. Headley*, 755.
8. VALUABLE CONSIDERATION IS ESSENTIAL to assignment by husband of wife's choses in action, to deprive wife of her right of survivorship. *Id.*
9. GENERAL ASSIGNMENT OF HUSBAND'S ESTATE IN BANKRUPTCY, or for benefit of creditors, does not defeat wife's right of survivorship in her choses in action which, though capable of being reduced to possession, are not so reduced during coverture. *Id.*
10. WIFE'S RIGHT TO A LEGACY MAY BE ASSIGNED BY HER HUSBAND. *Id.*
11. EQUITY WILL NOT AID A HUSBAND NOR HIS ASSIGNEE in obtaining possession of a wife's choses in action, unless an adequate provision is first made for her; and where it appears that all the property sought is not more than sufficient to make an adequate and necessary provision for the wife, the bill will be dismissed. *Id.*
12. DEED FOR SEPARATE MAINTENANCE OF WIFE, made after the separation has taken place, is valid. *Rolette v. Rolette*, 782.

See STATUTE OF LIMITATIONS, 6.

ILLEGAL CONTRACTS.

See CONTRACTS, 9, 10; ELECTIONS, 5.

IMPROVEMENTS.

- PARTY MAKING IMPROVEMENTS UPON THE LANDS OF ANOTHER, his possession being *bona fide* under a contract to purchase, which is void because not in writing, can recover in a court of equity the value of such improvements. *Herring v. Pollard*, 653.

See STREETS, 4.

INCUMBRANCES.

See DAMAGES, 2.

INDEMNITY.

1. INDEMNITY FOR ACTS APPARENTLY RIGHT, or not apparently wrong, is valid, where the means employed are not in themselves criminal and are not known by the person employed to be wrongful, though they work a trespass on the rights of a third person. *Ives v. Jones*, 421.
2. *IDEM.*—Where defendant represented to plaintiff that he owned a tract of land up to a certain point and employed him to move back a fence situated thereon to that point, agreeing to save the plaintiff harmless from

any proceedings taken by the owner of the adjoining tract, he will be responsible for the damages the plaintiff was compelled to pay in a suit by owner of the adjoining tract for trespass. *Id.*

See EXECUTIONS, 9.

INDEPENDENT COVENANTS.

See COVENANTS, 3.

INDICTMENTS.

See CONSPIRACY; CRIMINAL LAW, 2, 4.

INDORSEMENTS.

See NEGOTIABLE INSTRUMENTS, 4, 18, 19; STATUTE OF FRAUDS, 6; STATUTE OF LIMITATIONS, 7; SUNDAYS, 2.

INFANCY.

1. INFANT IS LIABLE FOR NECESSARIES ONLY, and then only for such quantity thereof as is sufficient to supply his wants. *Johnson v. Lines*, 542.
2. TRADERMAN WHO FURNISHES SUPPLIES TO INFANT IS BOUND, at his peril, to know that they were actually needed by him. *Id.*
3. GUARDIAN'S PERMISSION CAN NOT HAVE THE EFFECT TO CHARGE MINOR personally for articles that are not necessities, and where a guardian abuses his trust by allowing an infant to run up extravagant bills, the tradesman can not recover for more than was necessary to relieve the ward's necessities. *Id.*
4. WHAT ARE NECESSARIES IS A MIXED QUESTION OF FACT AND LAW; but the court may instruct the jury that an oversupply of goods, otherwise necessary, ceases to be a supply of necessities, as to the excess. *Id.*
5. INFANT OUGHT TO SUE BY PROXIMUS AMI. *Drago v. Mosco*, 592.
6. OBJECTION OF INFANCY IN PLAINTIFF can only be made by plea in abatement, and can not be given under the general issue. *Id.*
7. INFANCY OF PLAINTIFF IS MATTER OF FORM, and is waived by pleading the general issue. *Id.*

See CONSPIRACY, 2; DOWER; STATUTE OF LIMITATIONS, 8.

INJUNCTIONS.

1. REMEDY BY INJUNCTION DOES NOT LIE TO PREVENT a mere ordinary trespass, where the injury that may be done is not irreparable and where a recovery in damages affords an adequate remedy. *Smith v. Pottingill*, 667.
2. OWNER OF LEGAL TITLE IS NOT ENTITLED TO INJUNCTION against ejectment to recover the land, because he has a perfect defense at law. *Padgett v. Lawrence*, 232.

See CORPORATIONS, 5.

INNS.

1. RESPONSIBILITIES OF INNKEEPER ATTACH to one keeping an inn *de facto*, although he has no license as required by statute. *Dickerson v. Rogers*, 642.
2. INNKEEPER IS LIABLE FOR HORSES OF GUESTS INJURED OR KILLED by negligence in securing them, or by imperfect and badly constructed stable. *Id.*

INSANITY.

1. **MEDICAL EXPERT HAVING TESTIFIED IN GENERAL TO HIS BELIEF** in a prisoner's insanity, may be asked, on cross-examination, whether he believed that the prisoner was able to distinguish right from wrong, and that it was wrong to commit murder, arson, rape, or burglary. *Clark v. State*, 481.
2. **NON-EXPERTS MAY TESTIFY AS TO THEIR OPINIONS OF A PRISONER'S INSANITY**, while both they and experts should state the facts upon which such opinions are based. *Id.*
3. **WEAKNESS OF MIND ALONE IN PARTY CONTRACTING**, without fraud, is not sufficient ground to invalidate an instrument. *Smith v. Beatty*, 435.
4. **OLD AGE ALONE IS NOT A GROUND FOR INVALIDATING CONTRACT** unless combined with weakness of mind and fraud. *Id.*

See MARRIAGE AND DIVORCE, 2, 2.

INSTRUCTIONS.

See INFANCY, 4; EVIDENCE, 10; PLEADING AND PRACTICE, 28.

INSURANCE—FIRE.

1. **REFERENCE IN INSURANCE POLICY TO A SURVEY, APPLICATION, or other paper** does not ordinarily make it a part of the contract so as to change representations therein into warranties, but it is otherwise where an application is expressly referred to "as forming a part" of the policy, and the application and policy must be read as one instrument. *Burritt v. S. Co. M. F. I. Co.*, 345.
2. **CONCEALMENT OF MATERIAL FACTS BY APPLICANT FOR FIRE INSURANCE** will not vitiate the policy, it seems, as it would a marine policy, if no inquiry is made as to those facts, but if such inquiry is made the concealment is as fatal to a fire policy as to a marine one. *Id.*
3. **OMISSION TO MENTION ALL BUILDINGS WITHIN TEN RODS** of an insured building, where the conditions annexed to the policy and the printed form of application furnished to the assured require that fact to be stated, is fatal to an action on the policy, especially where the omitted buildings are of a hazardous nature, with respect to danger from fire. *Id.*
4. **MATERIALITY TO RISK OF FACTS CONCEALED BY AN APPLICANT** for fire insurance should be left to the jury if there is doubt on that point. *Id.*
5. **CONCEALMENT WHICH IS NOT FRAUDULENT WILL AVOID A FIRE POLICY** if the conditions annexed to the policy and the form of application require the concealed fact to be stated, and if one of the conditions expressly provides that "any misrepresentation or concealment" will vitiate the policy. *Id.*
6. **MATERIALITY OF FACT CONCEALED IS NOT OPEN TO DISCUSSION** where the conditions annexed to an insurance policy provide that any concealment shall avoid the policy, for concealment in such a case stands upon the same footing as a warranty. *Id.*
7. **DAMAGE BY LIGHTNING WITHOUT ANY COMBUSTION** is not within the terms of a policy of insurance providing against losses by fire. *Kenniston v. Mer. Co. Mut. Ins. Co.*, 193.

INTEREST.

See USURY, 2.

JUDGMENTS.

1. ENTRY OF PAYMENT OF A JUDGMENT MADE BY A JUSTICE OF THE PEACE upon his docket, in his official capacity, is *prima facie* evidence of the fact of payment, and to justify an execution issued at a subsequent date, the party claiming under the execution must show that the entry was erroneous. *Beach v. Botsford*, 45.
2. ENTRIES MADE BY A JUSTICE UPON HIS DOCKET, apparently in his individual capacity, and explanatory of prior entries made in his official capacity, as, for instance, of a prior entry of payment of judgment, are not evidence in themselves, and can not be heard to control such prior entries. *Id.*
3. JUDGMENT ENTERED BY A JUSTICE BY VIRTUE OF A STATUTORY AUTHORITY must show that the requirements of the statute have been complied with, and if it fails in this is void. *Id.*
4. FORMAL ENTRY OF JUDGMENT MAY BE MADE AT ANY TIME; and a justice or magistrate may be allowed to draw up or to amend a record of conviction, for his own protection, after he has committed the party convicted, or after *certiorari* has issued, requiring him to make a return of his proceedings. *Hall v. Tuttle*, 392.
5. THOUGH STATUTE REQUIRE JUDGMENT TO BE FORTHWITH RENDERED and entered, upon the return of a verdict, a judgment rendered in due time will not be reversed because not entered in the docket until two or three days thereafter. *Id.*
6. *WATSON v. DAVIS*, 19 WEND. 371, EXPLAINED. *Id.*
7. CONFESSION OF JUDGMENT TO CREDITOR WITH VIEW TO PREFER HIM, is not invalid, as contravening the provisions of the bankrupt act, where it is not voluntary, but the effect of measures taken by the creditor, or which it was in his power to take; and a party who undertakes to defeat such a transaction is bound to show clearly that it is voluntary. *Haldeman v. Michael*, 546.
8. JUDGMENT OBTAINED BY ONE FIRM AGAINST ANOTHER FIRM, constituted in part of the same members, can not be enforced by levy upon the separate property of an individual member of the defendant firm. *Tacey v. Church*, 575.
9. ADJUDICATION OF COURT MARTIAL or of any other tribunal of special jurisdiction, can not be avoided in a collateral action, for irregularity in the proceedings, where the court had jurisdiction both of the subject-matter and of the person. *Brown v. Wadsworth*, 674.
10. MONEY PAID UPON A JUDGMENT IN A COURT of competent jurisdiction, can not be recovered in another action. *Kirklan v. Brown*, 635.
11. JUDGMENT PROCURED IN AN ACTION PROSECUTED IN THE NAME of the covenantee, by one to whom the benefit of the covenant has been assigned, is evidence between such covenantee and assignee, and may be used by the latter to show that the representations of the former as to the existence of any claim by him against the defendant in the action were false. *Cartwright v. Carpenter*, 66.
12. WHEN ONE COVENANTS FOR RESULTS OR CONSEQUENCES OF SUIT between other parties, the judgment or decree therein is evidence against him. *Rapelye v. Prince*, 267.
13. WHERE ASSIGNOR OF MORTGAGE COVENANTS WITH ASSIGNEE that the property mortgaged will produce a given sum over and above the costs of

- foreclosing, and that, if it does not, he will pay the deficiency, the proceedings in the suit to foreclose will, in an action on the covenant, be evidence against such assignor, to show the amount of the deficiency; and he will be estopped by the decree from questioning the amount found due thereby, no fraud being suggested. *Id.*
14. JUDGMENT, GIVEN IN EVIDENCE under the general issue, is as conclusive as though specially pleaded in bar. *Offutt v. John*, 125.
 15. JUDGMENT AGAINST ONE OF TWO JOINT OBLIGORS in an action against both, though only one is served, is erroneous in substance, and the defect can not be overlooked on writ of error. *Nelson v. Bostwick*, 310.
 16. CREDITOR BY JUDGMENT IN ANOTHER STATE, against a citizen of the same state, can not come into this state for satisfaction out of the debtor's property, situated here. *McLure v. Benceni*, 437.
 17. JUDGMENT OF COURT OF ONE STATE IS DEEMED VALID and conclusive in the courts of a sister state. *Id.*
 18. IDEM—COURTS WILL AID EXECUTION OF FOREIGN JUDGMENT by receiving it as evidence of a debt, or of property, when it is made the subject of direct action or defense in those courts, and in no other manner. *Id.*
 19. IDEM—JUDGMENT OF SISTER STATE CAN NOT BE ENFORCED HERE by process of execution issued by our courts in the first instance, for the defendant has a right to contest the fact whether it be a judgment in another state or not. *Id.*
 20. JUDGMENTS OF SISTER STATES ARE CONCLUSIVE of the fact of indebtedness. *Napier v. Gidiere*, 613.
 21. PLEAS IN SUIT ON JUDGMENT OF SISTER STATE are left to be prescribed by the states; the act of congress of 1790 was intended only to render a judgment conclusive of everything decided by it. *Id.*
 22. STATUTES BARRING ACTIONS ON JUDGMENTS OF SISTER STATES, if they are not brought within a specified period, may be passed. *Id.*
 23. JUDGMENT MERGES CONTRACT DEBT on which the action was brought. *Id.*
 24. SUITS ON JUDGMENTS OF SISTER STATES ARE NOT INCLUDED IN OUR STATUTE of limitations of this state; therefore such an action is not barred by lapse of time. *Id.*
 25. DECREE IS NOT BINDING ON THOSE NOT PARTIES. *Winborn v. Gorrell*, 456.
 26. DECREE IN EQUITY IS NOT A LEGAL TITLE, when it requires a person to convey the title by executing a deed; and until such conveyance the title remains in the persons against whom the decree is rendered. *Id.*
 27. IDEM.—Where a party obtaining such a decree conveys the land covered thereby in trust for his creditors, the creditors get only an equity that is subject to prior equities against the assignor. *Id.*
 28. PERSONAL DECREE will not be rendered against the heirs of a purchaser; the decree should be that, unless they pay the debt within some reasonable time, to be specified in the decree, the lands be sold. *Wade v. Greenwood*, 759.
 29. IN SCIRE FACIAS OR OTHER PROCEEDINGS TO REVIVE A JUDGMENT, it is not competent to allege any matters which might have been pleaded to the original action, or which existed prior to the entry of the original judgment. *May v. State Bank of N. Carolina*, 726.

30. DEATH OF SOLE PLAINTIFF OR DEFENDANT ABATES AN ACTION at common law; but by statute 17 Charles II., c. 8, the death of either party after verdict, and before judgment, could not be alleged for error, and the judgment was entered as though the party were alive, but must have been revived by *scire facias* before execution could regularly issue. *Id.*
 31. DEATH OF SOLE PLAINTIFF AFTER JUDGMENT renders a *scire facias* necessary to the issuing of execution. *Id.*
 32. IF CORPORATION EXPIRES AFTER JUDGMENT, execution can no longer issue in its name. *Id.*
 33. THOUGH THE CHARTER OF A CORPORATION EXPIRED BEFORE JUDGMENT IN ITS FAVOR, no execution can issue on such judgment, and the defendant is not estopped, on a motion to quash the execution, from showing the expiration of such charter before judgment. *Per* Allen and Brooke, JJ.; Baldwin, J., dissenting, and Stanard, J., not concurring in this part of the decision. *Id.*
- See CONSTITUTIONAL LAW, 9; CORPORATIONS, 1, 2; EQUITY; EXECUTIONS, 6; PROCESS, 5; SET-OFF, 1, 4.

JUDICIAL LIABILITY.

See OFFICES AND OFFICERS, 1, 2.

JUDICIAL NOTICE.

See EVIDENCE, 1.

JUDICIAL SALES.

See EXECUTORS AND ADMINISTRATORS, 2, 3; SET-OFF, 2.

JURISDICTION.

1. PROCEEDINGS OF COURTS OF GENERAL JURISDICTION are presumed to be regular and within the scope of their authority. *Adams' Lessee v. Jeffries*, 477.
 2. COURT HAS NO JURISDICTION TO HEAR AND DETERMINE an application for the sale of an intestate's real estate, when the heir is not a party to such proceeding, and an order of sale made under such circumstances is void. *Id.*
- See EQUITY, 6, 7; FALSE IMPRISONMENT; PLEADING AND PRACTICE, 25; PROCESS, 7.

JURY AND JURORS.

1. AFFIDAVITS OF JURORS MAY BE RECEIVED IN EVIDENCE in exculpation of themselves and in support of their verdict, when such verdict is impeached on the ground of the improper conduct of the jury. *Tenney v. Evans*, 166.
2. VERDICT WILL BE SET ASIDE UPON ITS APPEARING that a juror had repeatedly said before the trial, that the plaintiff would succeed, taken in connection with the fact that the plaintiff had refused to go home one night, for the express purpose of staying and seeing some of the jurors. *Id.*

JUSTICES' JUDGMENTS.

See JUDGMENTS, 1-4.

JUSTIFICATION.

See PROCESS, 3-6.

LANDLORD AND TENANT.

1. TENANT CAN NOT DISPUTE THE TITLE OF HIS LANDLORD, either by setting up title in himself or another, during the existence of the lease or tenancy. *Whaley v. Whaley*, 594.
2. TENANT HOLDING AFTER EXPIRATION OF TERM is a tenant by sufferance, and holds by the title of his original landlord, until a notice to quit, or until a disclaimer of tenancy on his part. *Id.*
3. STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF TENANT by sufferance, or one entering by permission, paying no rent, until such tenant notifies the landlord that he claims adversely. The knowledge of disclaimer must be brought home to the landlord to set the statute to running. *Id.*
4. PARTICIPATION IN PROFITS, WITH A POSSESSION which does not exclude the owner, will not of itself make a lease. *State v. Page*, 608.
5. POSSESSION, TO "MANAGE AND CONDUCT" a hotel for a fixed compensation, creates an agency and not a tenancy. *Id.*
6. RESERVATION OF RENT IS NOT NECESSARY to the creation of a lease for years. *Id.*
7. APPORTIONMENT OF RENT MAY BE MADE between landlord and purchaser at sheriff's sale, and such landlord can not collect rent accruing after the sale. *Moore v. Turpin*, 589.

See EXECUTIONS, 13.

LAW OF THE LAND.

See CONSTITUTIONAL LAW 6.

LEASES.

See LANDLORD AND TENANT, 4-6.

LEGACIES.

See ESTATES OF DECEASED PERSONS, 2-4, 7; EXECUTORS AND ADMINISTRATORS, 9; HUSBAND AND WIFE, 10; WILLS.

LEGISLATURE.

See CONSTITUTIONAL LAW, 3, 8; CORPORATIONS, 10.

LETTERS OF CREDIT.

See NEGOTIABLE INSTRUMENTS, 2.

LEVY.

See EXECUTIONS.

LEX FORI.

See PLEADING AND PRACTICE, 1.

LICENSE.

See DEDICATION, 6; INNS, 1.

LIENS.

ESTATE IS SECURITY FOR PURCHASE MONEY to be paid until an actual conveyance. *Wimborn v. Gorrill*, 456.

See COMMON CARRIERS, 10; FACTORS, 1; HUSBAND AND WIFE, 3; NOTICE, 1; SALES, 2; SURETYSHIP, 7.

MALICIOUS PROSECUTION.

1. PROBABLE CAUSE, IN ACTION FOR MALICIOUS PROSECUTION, amounting to a justification, exists where the defendant had a reasonable belief that the plaintiff committed the crime charged, whether the belief was well founded or not. *Seibert v. Price*, 525.
2. SENDING OUT WITH JURY, IN ACTION FOR MALICIOUS PROSECUTION, DEFENDANT'S AFFIDAVIT before the magistrate, in instituting the prosecution complained of, is not error. *Id.*

MANDAMUS.

SUPREME COURT CAN NOT ISSUE MANDAMUS to the district court of the city and county of Philadelphia, to compel the judge of said court to sign a bill of exceptions. *Drexel v. Man*, 573.

MARRIAGE AND DIVORCE.

1. DIVORCE FOR CRUELTY—WHERE HUSBAND USES LANGUAGE TO HIS WIFE NOT USUAL to be addressed to slaves, threatens to drive her from the house, slaps her, chokes her, has an ungovernable passion, and prays God in her presence to deliver him from her, the wife is entitled to a divorce in Tennessee. *Payne v. Payne*, 660.
2. MARRIAGE OF LUNATIC IS ABSOLUTELY VOID. *Crump v. Morgan*, 447.
3. ACTION TO NULLIFY MARRIAGE ON THE GROUND OF INEBRITY may be brought in the name of the lunatic, by her committee. *Id.*

See CONSPIRACY, 2; HUSBAND AND WIFE, 6.

MARRIED WOMEN.

1. WIFE CAN NOT ACQUIRE SEPARATE PROPERTY FROM HER HUSBAND in her savings, out of a voluntary allowance from her husband, except by a clear, irrevocable gift, either to some person, as a trustee, or by some clear and distinct act of his, by which he divests himself of the property. *Kee v. Vasser*, 442.
 2. WIFE'S SAVINGS ARE HER SEPARATE PROPERTY, when the husband acknowledges at sundry times that they are her separate property; and they keep separate accounts at neighboring stores; and a loan of the savings is made by her, with her husband's consent, and a bond for the same taken in her name; and the husband himself borrows money from the wife. *Id.*
- See BOUNDARIES; DOWER; HUSBAND AND WIFE; STATUTE OF LIMITATIONS, 6, 8.

MASTER AND SERVANT.

MASTER DISCHARGING SERVANT BEFORE THE END OF THE YEAR, where the hiring is by the year, is liable for wages for the full time. *Ferreira v. Sayres*, 496.

MEMORANDUM.

See STATUTE OF FRAUDS.

MERGER.

ALL VERBAL CONTRACTS MADE BY A GRANTOR, AT OR BEFORE EXECUTION OF THE DEED, are merged in the conveyance and the covenants contained therein for the protection of the title of the grantee. *Hunt v. Amidon*, 233.

See JUDGMENTS, 23; PARTNERSHIP, 2.

MISTAKE.

See NEW TRIAL, 2.

MORTGAGES.

DEED OF FORECLOSURE AND SALE UNDER IT AMOUNT TO AN EVICTION, in equity, although the owner in possession becomes the purchaser at the sale, where the mortgage foreclosed was one which his grantor was, by a covenant in his deed, bound to pay; and therefore the payment made by such owner will be regarded as made by coercion of legal process for the benefit of his grantor, which the former may recover back from the latter in the equitable action of *assumpsit* for money paid for his use. *Hunt v. Amidon*, 283.

See JUDGMENTS, 13.

MULTIFARIOUSNESS.

See EQUITY, 3.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 10; NUISANCE; STREETS.

NAMES.

"JUNIOR" ANNEXED TO GRANTEE'S NAME in deed is no part of the name, but is descriptive merely, and in such a case, if there are three persons of the same name, grandfather, father, and son, the latter a minor of seven or eight years of age, and it appears that the father is known as "junior," and that the original contract of sale was made with him, he will be deemed the party intended in the deed. *Padgett v. Lawrence*, 232.

NECESSARIES.

See INFANCY.

NEGLIGENCE.

See AGENCY, 5.

NEGOTIABLE INSTRUMENTS.

1. **ORDER DRAWN PAYABLE OUT OF A PARTICULAR FUND** is not a bill of exchange; and, though accepted generally, suit can not be maintained without an averment that the fund came into the possession of the acceptor. *Van Vactor v. Flack*, 100.
2. **NOTE SIGNED IN BLANK AND DELIVERED TO ANOTHER** to fill up is an unlimited letter of credit. If the authority to fill up is limited to a cer-

- tain amount, a third person taking with knowledge of the limited authority may enforce the note to the amount to which it was authorized, but not beyond that amount. *Johnson v. Blasdale*, 85.
2. **NOTHING IS A PROMISSORY NOTE IN WHICH THE PROMISE TO PAY** is merely inferential; hence an instrument in the following words, signed by the cashier of a bank, is not a promissory note: "I hereby certify that C. S. Tarply has deposited in this bank, payable twelve months from first May, 1839, with five per cent. interest till due, per annum, three thousand six hundred and ninety-one dollars and sixty-three cents, for the use of R. Patterson & Co., and payable only to their order upon the return of this certificate." Such instrument is a certificate of deposit on special terms; for purposes of commercial responsibility it is not negotiable, but is merely a special agreement to pay the deposit to any one who presents it and the depositor's order. *Patterson v. Poindexter*, 554.
 4. **INDORSEMENT IN BLANK, WITH EXPRESS AUTHORITY** "TO FILL UP the indorsement in any way he thought proper," given by the indorser to the holder, does not give the latter authority to fill up "waiving demand and notice." *Kimbro v. Lamb*, 628.
 5. **MAKER OF A NOTE, WHO ON A NEW CONSIDERATION**, and with full knowledge of the circumstances under which it had been given, promises to pay the same, can not defeat an action thereon, because it had been originally obtained without consideration, and through false and fraudulent representations. *Russell v. Abbott*, 169.
 6. **SUCH PROMISE, EVEN IF MADE AFTER AN ACTION ON THE NOTE** has been commenced, relates back to time of the execution of the note, and is sufficient to sustain the action. *Id.*
 7. **MEMORANDA OF DECREASED TELLER OF BANK**, made in the usual course of his employment, are admissible in evidence in proving a demand by him on the maker of a note, and notice to the indorsers. And where such memoranda are abbreviated and elliptical, an expert may testify as to their meaning. *Sheldon v. Benham*, 271.
 8. **WHERE NOTE FALLS DUE ON FOURTH OF JULY**, demand should be made on the third. *Id.*
 9. **SERVICE OF NOTICE OF PROTEST OF NOTE** can not be made through the post-office where both parties reside in the same village. *Id.*
 10. **WAIVER OF DEMAND AND NOTICE BY THE INDORSER** to the maker of a note, uncommunicated to the holder, is not a waiver by the indorser to the latter. *Glasgow v. Pratte*, 142.
 11. **DEMAND OF NOTE PAYABLE IN A CERTAIN PLACE** must be made at the designated place to bind the indorser. *Id.*
 12. **NOTICE OF NON-PAYMENT MAY BE EITHER VERBAL OR IN WRITING**, and may be given by any party to the bill or note. *Id.*
 13. **IN GIVING NOTICE OF DISHONOR**, the law but requires due diligence in the communication. *Hazellon Coal Co. v. Ryerson*, 217.
 14. **NOTICE SENT BY MAIL IS SUFFICIENT** if directed to the post-office where the indorser usually receives his mail, though it is not the post-office nearest his residence. *Id.*
 15. **AGENT OF THE HOLDER OF A BILL, TO MAKE A DEMAND**, is entitled to one day, to give notice to his principal of a default; and the latter is entitled to one day after he receives the notice, to give, or forward notice by mail, to the drawer or indorser. *Ellis v. Commercial Bank*, 63.

16. PROTEST BY A NOTARY MUST BE BASED UPON A DEMAND made by himself; it is not sufficient that the demand was made by his clerk. *Id.*
17. HOLDER OF A NOTE MUST MAIL NOTICE OF PROTEST the day after protest, in time for a mail of that day, unless it leaves at an unreasonably early hour. *Downs v. Planters Bank*, 92.
18. INDORSEMENT IS A CONDITIONAL CONTRACT, and the plaintiff must prove performance of everything necessary, to charge an indorser. *Id.*
19. NOTICE TO INDORSER MAILED AT NINE O'CLOCK the day after protest, is not sufficient to charge him, in the absence of proof that that day's mail had not then left. *Id.*
20. DEMAND AND NOTICE OF NON-PAYMENT ON A PROMISSORY NOTE made in one state and payable in another, in an action against the non-resident indorser, may be proved by a notarial protest. *Williams v. Putnam*, 204.
21. NOTICE OF THE NON-PAYMENT OF A PROMISSORY NOTE in an action against a resident indorser, can not, by the common law, be proved by the protest. *Id.*
22. HOLDER OF A BILL WHO HAS PLACED NOTICE OF PROTEST IN THE POST-OFFICE in due time, is not responsible for any defects in the regulation of the mails, or for the time which may elapse between the deposit of the notice and its delivery. *Ellis v. Commercial Bank*, 63.
23. NOTE IN WHICH WORDS INDICATIVE OF THE TIME OF PAYMENT ARE OMITTED, as is the case where the note is payable "one after date," is void for uncertainty, and can not be aided by parol evidence as to the time of payment intended. *Wainwright v. Straw*, 675.
24. NOTE EVIDENTLY PAYABLE AT SOME TIME AFTER DATE can not be declared upon as a note payable on demand, though by reason of the omission of certain words, the exact time of payment can not be determined. So where a note is payable "twenty-four after date," it can not be declared upon as a note payable on demand. *Conner v. Routh*, 59.
25. WHERE THE WORD "MONTHS" IS OMITTED IN A NOTE, so that upon its face no time of payment is indicated, the omission may be supplied by the holder, and the alteration so effected will not vitiate the note. *Id.*
26. *IDEM.*—A NOTE IN WHICH THE WORD "MONTHS" HAS BEEN SUPPLIED by the holder, in order that it may indicate some time of payment, may be read in evidence to the jury without further evidence that that was the word intended, in support of a declaration where the note is declared upon as one payable so many "months" after date. *Id.*
27. JOINT ACTION ON NEGOTIABLE NOTE MAY BE BROUGHT against the maker and one who before the delivery thereof to the payee indorsed thereon these words: "For value received, I guarantee the payment of the within note, and waive notice of non-payment." Such guaranty amounts to an indorsement, and therefore the guarantor may, under the statute, be sued jointly with the makers. *Prosser v. Luqueer*, 288.
28. PAROL EVIDENCE IS NOT ADMISSIBLE TO SHOW THAT A PARTY TO A NOTE intended to contract for a different liability from that which is expressed in his written undertaking. *Id.*
29. NOTICE TO ONE OF TWO JOINT INDORSERS, NOT PARTNERS, of the dishonor of the note indorsed by them, is not sufficient to charge either. *Willis v. Green*, 351.
30. SURVIVOR OF TWO JOINT INDORSERS TAKING SECURITY from the maker of the note, upon being called on for payment, after dishonor, by a bond

and warrant of attorney given to secure that and other demands which he has against the maker, and afterwards collecting nearly the entire amount thereon, admits due notice to himself and his co-indorser so as to render him liable to the holder. *Id.*

See AGENCY, 3, 4; ASSIGNMENT, 2; BANKS AND BANKING; BONA FIDE PURCHASERS, 1, 2; CORPORATIONS, 9; COSTS, 1, 2; FACTORS, 2; SET-OFF, 3; STATUTE OF FRAUDS, 6; USURY.

NEWSPAPERS.

See COMMON CARRIERS, 16; NOTICE, 2.

NEW TRIAL.

1. GRANTING A NEW TRIAL ON THE GROUND OF SURPRISE is discretionary in the court below. The exercise of such discretion is not reviewable on appeal. *Sanford Mfg. Co. v. Wiggin*, 198.
2. MISTAKE AS TO THE LEGAL EFFECT OF EVIDENCE is not such surprise as warrants a new trial. *Id.*
3. REFUSAL TO ALLOW NEW TESTIMONY TO BE PUT IN after the case has been closed and the jury instructed is not ground for a new trial. *Id.*
4. SURPRISE IS NOT SUFFICIENT GROUND FOR MOTION FOR NEW TRIAL, after judgment has been perfected on the verdict. *Rapelye v. Prince*, 267.
5. MOTION FOR NEW TRIAL ON GROUND OF SURPRISE will be heard only at the special term. When the motion is made where there is also a case or bill of exceptions, the decision on the motion may be suspended until the calendar cause is argued. *Id.*
6. WHERE MOTION FOR NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE is made, the ground of surprise may also be added, if it exists, and the whole will then be heard together. *Id.*

NONSUIT.

See DAMAGES, 1.

NOTARIES.

See NEGOTIABLE INSTRUMENTS, 16; OFFICERS AND OFFICERS.

NOTICE.

1. INSTRUMENT CREATING EQUITABLE LIEN ON CHATTELS NEED NOT BE RECORDED in New York, under the act of 1833, where it is accompanied by an actual delivery and continued change of possession of the property. *Knapp v. Alvord*, 241.
 2. NOTICE OF THE CONTENTS OF A NEWSPAPER CAN NOT BE CHARGED to a person simply because he is a subscriber. *Watkins v. Peck*, 156.
- See BANKS AND BANKING, 2, 3; BONA FIDE PURCHASERS; FRAUDULENT CONVEYANCES; NEGOTIABLE INSTRUMENTS; SET-OFF, 6; STREETS, 2.

NUISANCE.

TEN-PIN ALLEY KEPT FOR GAIN IS A NUISANCE at common law, and may be prohibited by a municipal corporation under a charter, authorizing it to make by-laws relative to nuisances generally. So, although the rules of such alley expressly forbid all betting. *Tanner v. Trustees of Albion*, 337.

See CORPORATIONS, 10.

NUNCUPATIVE WILLS.

See WILLS, 15.

OFFICES AND OFFICERS.

1. JUDICIAL OFFICER IS NOT LIABLE IN A CIVIL ACTION, when acting judicially and within the sphere of his jurisdiction, although he may act from impure and corrupt motives. *Stone v. Graves*, 131.
2. JUDICIAL OFFICER IS LIABLE, WHEN ACTING MINISTERIALLY, for error and misconduct, in like manner with other ministerial officers. *Id.*
3. JUDGE IS NOT DISQUALIFIED FROM ADMINISTERING AN OATH to his brother. *Downer v. Hollister*, 175.
4. ONE WHO SUSTAINS INJURY BY MISFEASANCE OR NON-FEASANCE OF PUBLIC OFFICER, may obtain redress by an action adapted to the nature of the case. *Adsit v. Brady*, 305.
5. SUPERINTENDENT OF REPAIRS ON CANALS IS BOUND TO MAKE REPAIRS, and remove obstructions to navigation, without waiting for orders from the commissioners, and if he fails to do so he is liable to persons who sustain injury by reason of his neglect. To justify his omission he must prove affirmatively that it resulted from obedience to orders, and it will not be presumed that the commissioners gave an illegal or unjustifiable command. *Id.*
6. DECLARATION NEED NOT AVER THAT SUPERINTENDENT HAD PUBLIC MONEY in his hands for making repairs on canals, in an action against him for neglecting to make such repairs, by reason of which neglect the plaintiff sustained damage; nor is it necessary that such declaration should aver that the defendant's neglect was willful and malicious. *Id.*
7. NOTARY PUBLIC CAN NOT DELEGATE HIS OFFICIAL AUTHORITY. *Sheldon v. Benham*, 271.
8. LEGALITY OF THE ACTS OF FOREIGN PUBLIC OFFICIALS MAY BE INQUIRED into by the courts of other states. *Henry v. Sargeant*, 146.

See AGENCY, 3, 4; ATTACHMENTS, 2; TAXATION.

PARDON.

See CRIMINAL LAW, 5, 6.

PARENT AND CHILD.

See CONSPIRACY, 2; GIFTS.

PAROL EVIDENCE.

See DEEDS, 3; NEGOTIABLE INSTRUMENTS, 23, 28.

PARTITION.

1. COURTS OF CHANCERY CAN NOT DECREE PARTITION OF PERSONAL CHATTELS held in joint tenancy or tenancy in common. *Gudgell v. Mead*, 120.
2. INTERLOCUTORY DECREE THAT PARTITION be made of personal chattels can not be appealed from. *Id.*
3. DECREE IN PARTITION IS NOT A SETTLEMENT OF A TITLE, and will not estop the defendant from having a legal investigation of his title in an action of ejectment. *Nicely v. Boyles*, 638.

PARTNERSHIP.

1. PARTNER MAY BIND HIS COPARTNER BY CONTRACT UNDER SEAL, in the name and for the use of the firm, in the course of the partnership business, if the copartner assents to the contract before its execution, or afterwards ratifies and adopts it; and such assent or adoption may be by parol. *Bond v. Atkin*, 550.
2. BOND OF ONE PARTNER TAKEN AT TIME MONEY IS LOANED to the partnership, and as the consideration for such loan, is an extinguishment of the debt, and not a collateral security. *Id.*
3. LANDS PURCHASED WITH PARTNERSHIP FUNDS ARE SUBJECT TO A RIGHT OF DOWER where the purchase of the lands was not in pursuit of the partnership business, and it is not necessary to have recourse to the land in order to pay the firm debts; and where, moreover, there is no special agreement between the parties that the land shall be considered as personalty. *Markham v. Merrett*, 76.
4. DEED OF ASSIGNMENT EXECUTED BY ONE PARTNER ONLY, CAN NOT BE AVOIDED on that ground, when the property has been delivered to the assignee. *Hennessy v. Western Bank*, 560.
5. ASSIGNMENT BY PARTNERS, WHICH STIPULATES FOR A RELEASE, IS INVALID, unless it transfers the separate estate of each of the partners, and this although it may not affirmatively appear that the partner who failed to execute the deed of assignment had any separate property. *Id.*
6. CLAUSE IN ASSIGNMENT GIVING ASSIGNEE POWER TO APPOINT AGENTS AND ATTORNEYS to collect the assets of the debtor, and to remove or dismiss such agents or attorneys, does not invalidate the assignment; nor does a clause exempting the assignee from liability for effects that shall not come to his hands, or for losses which are not due to lack of diligence and fidelity on his part. *Id.*
7. GIVING MORE TIME TO FOREIGN CREDITORS than to those residing within the United States, within which to execute a release, does not make the assignment invalid. Such a discrimination is but just. *Id.*
8. ONE PARTNER CAN NOT SUE COPARTNER till there has been a complete settlement and a balance struck. *Graham v. Holt*, 408.
9. ONE PARTNER CAN NOT PLEAD THE NON-JOINDER OF A COPARTNER in abatement, where the contract upon which the action is brought was entered into by plaintiff with him alone, and without knowledge that it had reference to a partnership transaction. *Cleveland v. Woodward*, 682.
10. DEATH OF PARTNER DOES NOT TERMINATE EMPLOYMENT OF AGENT of the firm, hired, by express contract, for a definite period, so as to defeat his claim for compensation for the full period. *Ferreira v. Sagres*, 496.
11. DISSOLVED FIRM CONTINUES IN EXISTENCE for many purposes. *Id.*
12. DEATH OF A PARTNER MUST BE PROVED IN AN ACTION BY THE SURVIVING PARTNER to recover a debt due the firm, although it need not be alleged. *Ludden v. Colby*, 173.

See JUDGMENTS, 8; SET-OFF, 3.

PART PERFORMANCE.

See STATUTE OF FRAUDS, 9.

PAYMENT.

ALL PROPERTY, REAL AND PERSONAL, OF A DEBTOR, IS LIABLE, both during his life-time and afterwards, for the payment of his debts, which liability is to be made effectual by special provisions of the law for that purpose. *Ticknor v. Harris*, 186.

See **GUARDIAN AND WARD**, 1; **MORTGAGES; PARTNERSHIP**, 2; **STATUTE OF LIMITATIONS**, 3.

PLEADING AND PRACTICE.

1. **FORM OF ACTION TO RECOVER DAMAGES FOR AN ARREST** under an illegal assessment must be determined by the law of the state where such action is brought. In this state plaintiff may declare either in case or trespass. *Henry v. Sargeant*, 146.
2. **DEBT ON A SPECIALTY MAY BE JOINED** with debt on a simple contract. *Medlin v. Platte Co.*, 135.
3. **ALTERNATE PLEADING IN THE SAME COUNT**, as charging a loss or destruction, is bad: each should constitute a separate count. *Stone v. Graves*, 131.
4. **PLAINTIFF MUST DECLARE UPON THE CAUSE OF ACTION STATED IN HIS ORIGINAL WRIT**; but if the facts set forth in the writ show the action to be improperly entitled therein, as if it be styled an action of trespass, whereas it should be an action on the case, he may amend in his declaration by inserting the proper name. *Cogswell v. Baldwin*, 686.
5. **IT IS NOT NECESSARY TO PLEAD THE PRESUMPTION** which the law raises from a given state of facts. Thus if a levy is pleaded, the presumption being that the sheriff accomplished his duty by selling the property, it is not necessary to aver the sale. *Kershaw v. Merchants' Bank*, 70.
6. **IT IS NOT NECESSARY FOR A DEFENDANT IN HIS PLEADING TO STATE** more than a *prima facie* case. *Id.*
7. **NON-JOINDER OF A PARTY DEFENDANT**, where it does not necessarily appear from the complaint, must be pleaded in abatement. *State v. Woram*, 378.
8. **NON-JOINDER OF A CORPORATION AS A PARTY DEFENDANT** is not so apparent as to be reached by demurrer, where the complaint, though it shows that such corporation once existed, and was a proper party, does not show that such existence continued up to the filing of the complaint. *Id.*
9. **COMPLAINT UPON A PROMISE TO ANSWER FOR THE DEBT OF A THIRD PERSON** need not aver that the promise or consideration was in writing. *Id.*
10. **FOREIGN BANKING CORPORATION, SUING UNDER THE STATUTES OF THIS STATE**, need not allege their corporate existence, and may maintain a joint action against the drawer and indorser of a bill of exchange. *Lewis v. Bank of Kentucky*, 469.
11. **OBJECTION TO THE LEGAL EXISTENCE OF PLAINTIFF** must be raised below; it can not first be taken advantage of on appeal. *Id.*
12. **PLEA OF NON ASSUMPSIT PUTS IN ISSUE** the plaintiff's capacity to sue. *Id.*
13. **ONE SUMMONED TO APPEAR AT A GIVEN HOUR** is not in default if he appear before the next hour is struck. *Downer v. Hollister*, 175.
14. **PARTY WHO ATTENDS AT A GIVEN HOUR, PURSUANT TO NOTICE**, and finds either the magistrate or the opposite party absent, is bound to wait for the expiration of the hour before taking any steps prejudicial to the latter's rights. *Id.*

15. WHERE DEFENDANT WISHES TO CALL PLAINTIFF AS A WITNESS, under stat. 1837, sec. 2, he must serve him with a subpoena, as he would any other witness. *Rapelye v. Prince*, 267.
16. MOTION TO SUSPEND TRIAL TO ENABLE DEFENDANT TO SUBPENA WITNESS whom he failed to serve properly, is addressed to the discretion of the judge, and his decision thereon is not one to which an exception can be properly taken. If such an exception be taken, the judge should strike it out before he affixes his seal. *Id.*
17. MOTION CAN NOT BE RENEWED WITHOUT LEAVE OF THE COURT after being once denied, and this rule applies to a motion for a commission to take testimony, denied by the supreme court because of a formal defect in the affidavit. Hence, an order obtained from a circuit judge, after such denial, granting the commission, without a previous application to the supreme court for leave to renew the motion, is irregular, though, under special circumstances, it may be permitted to stand on payment of costs. *Dollfus v. Froesch*, 368.
18. COURT HAS NO DISCRETION TO REFUSE DECREE, on the hearing, when a party can legally demand it. *Crump v. Morgan*, 447.
19. CORRECT PRACTICE ON APPEALS FROM DECREES OF SURROGATES respecting the probate of wills in New York, stated by the chancellor. *Chaffee v. Baptist Missionary Conv.*, 225.
20. ANY PARTY TO A DECREE OR ORDER OF THE PROBATE COURT may appeal therefrom. *Porter v. Porter*, 55.
21. UPON A PRO CONFESSO DECREE IN THE PROBATE COURT the cause must be set for a final hearing, and a final decree must be entered in favor of complainants only after due and regular proof of their right to recover. *Id.*
22. TO A PETITION OR BILL TO OBTAIN DISTRIBUTION OF AN ESTATE, the administrator or executor is an indispensable party, without whom no decree can be properly entered. *Id.*
23. OBJECTIONS TO THE ADMISSIBILITY OF EVIDENCE, not made on the trial, will not be considered on appeal. *Clark v. State*, 481.
24. REHEARING CAN NOT BE GRANTED AFTER THE TERM in which a decree was pronounced. A bill of review is then the proper remedy. *Planters' Bank v. Neely*, 51.
25. GRANTING OF AN APPEAL AND ITS SUBSEQUENT PERFECTION DIVEST THE COURT BELOW of all jurisdiction, and it can not afterwards set aside the order from which the appeal has been taken. The loss of the bill of exceptions embodying the testimony upon which the appeal is founded, does not avoid this rule. *Id.*
26. MATTERS IN ABATEMENT EXISTING PRIOR TO A SUIT must be pleaded therein in proper time. After judgment the defendant is estopped from urging them, by writ of error or otherwise. *May v. State Bank*, 726.
27. MATTERS IN ABATEMENT ARISING PENDING A SUIT, should be brought to the attention of the court before judgment, or the defendant will be estopped from urging them as long as the judgment stands unreversed. *Id.*
28. REFUSAL TO INSTRUCT ON ABSTRACT PRINCIPLES OF LAW, not presented by the record, nor by the facts in the case, is not error, however correct the principle, applied to a proper case. *Doty v. Strong*, 773.

29. WHERE DEFENDANT'S DEFAULT IS WAIVED ON CONDITION that he will plead to the merits, he can not file a general demurrer. *Id.*

See ATTACHMENTS, 3; BONDS, 3; CORPORATIONS; COSTS; DAMAGES, 1; ESTATES OF DECEASED PERSONS, 5; EVIDENCE, 10, 11; EXECUTIONS; FERRIES; INFANCY, 7; JUDGMENTS; JURISDICTION, 2; JURY AND JURORS; MALICIOUS PROSECUTION, 2; MANDAMUS; MARRIAGE AND DIVORCE, 3; NEGOTIABLE INSTRUMENTS, 24, 27; NEW TRIAL; OFFICES AND OFFICERS, 6; PARTITION, 2, 3; PARTNERSHIP, 8, 12; SET-OFF; STATUTE OF FRAUDS, 10; SURETYSHIP, 2, 5, 8, 9; TRUSTS AND TRUSTEES, 2; WILLS, 6, 23.

POSSESSION.

See SALES, 1; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS, 8-10; TRESPASS, 1.

PRESCRIPTION.

See ADVERSE POSSESSION.

PRESUMPTIONS.

See ADVERSE POSSESSION; BOUNDARIES, 5; GIFTS; JURISDICTION, 1; PLEADING AND PRACTICE, 5; STATUTE OF LIMITATIONS, 7; WILLS, 2, 16, 17.

PRINCIPAL AND AGENT.

See AGENCY, 1.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROBATE COURTS.

CANON AND CIVIL LAWS ARE PARTS OF THE COMMON LAW, as they are administered by the ecclesiastical courts. *Crump v. Morgan*, 447.

See PLEADING AND PRACTICE, 19-21.

PROCESS.

- 1. IT IS NOT A PREREQUISITE TO THE ISSUANCE OF A SEARCH WARRANT** for stolen goods that any steps should be taken to inaugurate a prosecution against the party guilty of the theft; all that is required is an affidavit before a proper officer showing that the goods have been stolen, and that the applicant has sufficient grounds to believe that they are concealed in a place which he desires searched. *Chipman v. Bates*, 663.
- 2. NO RETURN IS REQUIRED UPON A SEARCH WARRANT, if the goods are not found. *Id.***
- 3. PLEA OF JUSTIFICATION, IN AN ACTION OF TRESPASS, UNDER A SEARCH WARRANT, interposed by the party at whose instance the writ issued, need not show that there were sufficient grounds for its issuance. *Id.***
- 4. SEARCH WARRANT IS A SUFFICIENT JUSTIFICATION, THOUGH THE STOLEN GOODS ARE NOT FOUND, even to the party at whose instance the writ issued, for an entry upon the suspected place, where the doors are found open and the entry is peaceable; whether it would be a justification where the doors are found closed and are broken down, not decided. *Id.***

6. MINISTRIAL OFFICER CAN NOT DEFEND UNDER PROCESS FAIR UPON ITS FACE ALONE, where the object of the action to which he is defendant, is, as in replevin, but to recover possession of the goods, seized under the process; he must, in all such cases, in addition to the process, show by the production of a valid judgment, that the court which issued it had authority to do so. *Beach v. Botsford*, 45.
6. VOID PROCESS IS NO JUSTIFICATION TO A SHERIFF for acts committed by virtue of it, but an irregular process is. *State v. Page*, 606.
7. STATUTES SUBSTITUTING OTHER THAN A PERSONAL SERVICE OF PROCESS, must be strictly complied with, to give the court jurisdiction, and this compliance must appear affirmatively in the proceedings. *Zecharis v. Bowers*, 111.

PROCHEIN AML

See INFANCY, 5.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See BANKS AND BANKING, 1; COSTS, 1, 2; NEGOTIABLE INSTRUMENTS.

QUIET ENJOYMENT.

See COVENANTS, 1, 2.

RAILROADS.

See SUBSCRIPTION.

RECEIPTORS.

See ATTACHMENTS, 6; EXECUTIONS, 2, 3.

RECEIVERS.

See CORPORATIONS, 4, 6.

RECORDS.

See DEEDS, 5; EVIDENCE, 2, 3; NOTICES, 1.

RECOUPMENT.

See SET-OFF.

REDEMPTION.

See EXECUTIONS, 15, 16.

RELIGIOUS SOCIETIES.

See TRESPASS, 2; WILLS, 13.

REMAINDERS.

See WILLS, 12.

RENT.

See ADVERSE POSSESSION, 5; EXECUTIONS, 12, 13; LANDLORD AND TENANT, 3, 6, 7.

REPLEVIN.

1. REPLEVIN CAN NOT BE MAINTAINED unless the plaintiff have, at the time of the taking, either the general or special property in the goods. *Sawford Mfg. Co. v. Wiggin*, 198.
2. GENERAL ISSUE IN AN ACTION OF REPLEVIN is simply a denial of the taking, and admits the plaintiff's property in the thing taken. *Id.*
See PROCESS, 5.

RESCISSION.

See SALES, 2.

RETURN.

See EXECUTIONS, 10; PROCESS, 2.

REVIEW—BILLS OF.

See PLEADING AND PRACTICE, 24.

SALES.

1. PERSONAL PROPERTY MAY BE SOLD CONDITIONALLY, the same as real property. Possession, although *prima facie* evidence of ownership, may be rebutted. *Mowat v. Harris*, 89.
2. RESCISSION OF A SALE, WHERE THE VENDOR CAN NOT PAY the purchase money, may be made by agreement of the parties, and when made, will cut out liens subsequently acquired against the vendee. *Id.*
3. UNDER A CONTRACT TO DELIVER WOOD TO A LARGE AMOUNT before a day certain, the delivery need not be of the entire amount at the same time, but may be of portions upon several days, and the delivery of each portion vests title in the vendee, and subjects him to the risk of future loss of the property. *Hunt v. Thurman*, 683.
4. PLACE OF DELIVERY MENTIONED IN A WRITTEN CONTRACT OF SALE may be changed by subsequent parol agreement. *Id.*
5. DELIVERY BY A VENDOR IS SUFFICIENT where all has been done by him that he may do, though something remains to be accomplished by the vendee. Thus the delivery of wood sold by the cord may be sufficient, though it has not been measured by the vendee. *Id.*
6. ABSOLUTE DELIVERY OF CHATTEL PURSUANT TO BARGAIN PERFECT, or capable of being made so by reference to something else, or to an arbiter, vests the ownership in the purchaser. And therefore, a sale of a raft of boards at so much per thousand feet, and delivery thereof to the buyer, changes the property, although the number of feet contained therein remains to be ascertained. *Scott v. Wells*, 568.
7. WHERE CHATTEL HAS BEEN UNCONDITIONALLY SOLD AND DELIVERED, no subsequent negotiations in reference thereto, that afterwards fail, can alter the terms of the sale or affect the title of the property. *Id.*

See ATTACHMENTS, 4, 5; DAMAGES, 4; EQUITY, 4; ESTOPPEL; GAMING, 3; SHIPPING, 1; STATUTE OF FRAUDS: USURY.

SCIRE FACIAS.

See JUDGMENTS, 29-33.

SEARCH WARRANT.

See PROCESS, 1-4.

SEISIN.

See EQUITY, 8.

SEPARATE ESTATE.

See MARRIED WOMEN.

SET-OFF.

1. ONE JUDGMENT MAY BE SET OFF AGAINST ANOTHER, although the parties to the two records are not identical, and although one of the judgments has been assigned to a third person for a valuable consideration, and without notice of the existence of the other judgment, provided the right of set-off existed at the time of the assignment. *Graves v. Woodbury*, 296.
2. RIGHT TO SET OFF ONE JUDGMENT AGAINST ANOTHER DOES NOT ARISE until judgment is actually entered on both sides; and therefore there can be no set-off in a case where a claim which has been referred, is assigned before judgment is entered upon the report of the referee. *Id.*
3. IN EQUITY, WHERE DEMANDS ARE IN REALITY MUTUAL, THEY MAY BE SET OFF, though they are not nominally mutual. Thus where a note executed to a firm, has become the separate property of one of the partners, a demand due to its maker by this partner, may be set off against the judgment obtained by him on the note in the firm name. *Foot v. Keckum*, 678.
4. SET-OFF.—WHERE A JUDGMENT HAS BEEN SATISFIED BY A LEVY UPON THE PROPERTY of one defendant, the claim which accrues to him may be set off in an action brought against him by his co-defendant, or by his assignee, where, under the statute, the latter is subject to the same set-offs as the former. *Kershaw v. Merchants' Bank*, 70.
5. PLEA OF SET-OFF, WHICH PROFFESSES TO GO TO THE WHOLE ACTION, where the amount of the set-off is less than the amount sued for, is demurrable. *Id.*
6. DAMAGES MAY BE RECOUPED IN ACTION ON SEALED INSTRUMENT, as well as on an unsealed one, by showing a partial failure of consideration, under 2 N. Y. R. S. 406, sec. 77; but notice of the defense is necessary, and it can not be pleaded where it does not go to the whole consideration. *Van Epps v. Harrison*, 314.
7. VENDEE MAY RECOUP DAMAGES FOR FRAUDULENT MISREPRESENTATIONS by the vendor as to the condition of the land sold and its adaptability for the use for which the vendor knew that the vendee wanted it, in an action for the price, where the vendee trusted to the representations in making the purchase. *Id.*
8. VENDOR'S FRAUDULENT MISREPRESENTATIONS AS TO THE PRICE paid by him for the land sold, are admissible in evidence by way of recoupment in an action against his vendee for the purchase money. *BRONSON, J., contra. Id.*

3. **DAMAGES.**—Where plaintiff was owner of one third of land and her infant child the owner of two thirds, and an order of court had been made confirming her sale of the land, the vendee will not be entitled in an action for the purchase money to set up a discount for the infant's share. *Martin ada. Bobo*, 587.

SHERIFFS.

See ATTACHEMENTS; CO-TENANCY, 2; EXECUTIONS.

SHIPPING.

1. **MASTER OF A SHIP IS NOT AN AGENT OF THE CONSIGNOR**, to judge for him when the goods are so damaged as to make a sale necessary before they reach their destination. *Hahneron v. Cole*, 603.
2. **NO FREIGHT CAN BE CHARGED WITHOUT DELIVERY** at the place of destination, unless prevented by dangers of the sea, or other unavoidable casualties. *Id.*

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE OF CONTRACT OF PURCHASE will be decreed against a purchaser, who has gone into possession and held it for many years, though the deed under which the vendor derails title has been lost. But in such case, as the *onus* of proving such title rested on the vendor, he must pay the costs. *Wade v. Greenwood*, 759.

STATUTE OF FRAUDS.

1. **STATUTE OF FRAUDS APPLIES TO EXECUTORY CONTRACTS OF SALE** as well as to contracts for the immediate sale and delivery of goods, and equally in the former case as in the latter requires written evidence of the contract. Whether this would be the case were the goods to be delivered in the future, to be manufactured by the seller, or were some important alteration in their form to be effected by him before delivery, not decided. *Id. v. Stanton*, 698.
2. **WRITTEN EVIDENCE OF CONTRACT** required by the statute of frauds need not be contemporaneous with the contract. A written admission of a previous verbal contract will suffice. Nor need it be all in one instrument; different writings, each of which is signed by the party, may be brought together. *Id.*
3. **NOTE OR MEMORANDUM OF BARGAIN REQUIRED BY THE STATUTE OF FRAUDS** upon a contract of sale must express the price upon which the sale was effected, or it will be insufficient. *Id.*
4. **PROMISE MADE FOR THE BENEFIT OF ANOTHER** need not necessarily be in writing. *Proprietors v. Abbott*, 184.
5. **AGREEMENT TO PAY TOLL ON CERTAIN LUMBER** of a third party, if the plaintiff would allow the same to pass through his canal locks, is an original undertaking and need not be in writing. *Id.*
6. **STATUTE OF FRAUDS APPLIES TO PAROL PROMISE TO INDORSE NOTE** for a purchaser of goods in consideration that the vendor will sell to him, and no action will lie on such promise. *Carville v. Crane*, 364.
7. **STATUTE OF FRAUDS SHOULD BE LIBERALLY CONSTRUED.** *Id.*
8. **PAROL CONTRACT FOR SALE OF LAND BY AGENT** of the owner, and his admission of the purchaser into possession, are unauthorized, and do not take the case out of the statute of frauds, nor furnish a defense to an action.

of trespass by the owner, where the agent is acting under a special authority requiring him to enter into written contracts for the sale of the land. *Baring v. Peirce*, 534.

9. ENTERING UPON LAND AND CUTTING TIMBER IS NOT POSSESSION so as to constitute part performance of a contract of sale. *Id.*
10. COURT MUST DETERMINE WHAT ACTS CONSTITUTE POSSESSION so as to defeat an action of trespass, or make out a contract for the sale of the land, so as to take the case out of the statute of frauds, and it is error to leave those questions to the jury. *Id.*
11. STATUTE OF FRAUDS—UPON A JOINT SALE TO TWO, BOTH VENDREES ARE PRINCIPALS, though the article sold might have been intended by them for the individual use of one; and therefore the undertaking of the other is not required by the statute of frauds to be in writing. *Wainwright v. Street*, 675.

STATUTE OF LIMITATIONS.

1. ACTION UPON AN ADMINISTRATOR'S BOND IS BARRED IN MISSOURI by a lapse of ten years after the cause of action accrued. *State v. Pratt*, 140.
2. STATUTE OF LIMITATIONS WILL RUN AGAINST THE STATE, where a bond is taken in its name, but for the use of an individual. *Id.*
3. PROPERTY OF A DEBTOR CAN NOT BE APPLIED TO THE PAYMENT OF A DEBT, when the remedy thereon is barred by statute. *Ticknor v. Harris*, 186.
4. NEW PROMISE, TO TAKE CASE OUT OF STATUTE OF LIMITATIONS, must be a direct promise to pay the debt; a promise can not be inferred from a mere acknowledgment that the defendant owed the plaintiff some debt. *Rainey v. Link*, 411.
5. WHERE THE PROMISES OF OBLIGORS ARE SEVERAL, NO ADMISSION or promise by one can remove the bar of the statute of limitations as against the others. *Powers v. Southgate*, 691.
6. *IDEM*—PROMISE OF THE HUSBAND TO PAY THE DEBT OF THE WIFE incurred before coverture, can not remove the bar of the statute of limitations against her. *Id.*
7. INDORSEMENT OF CREDIT ON A BOND MADE BY THE OBLIGEE within the period that raises a presumption of payment, may be considered as a circumstance tending to rebut such presumption, because, when made, the indorsement was against his interest. *Dabney v. Dabney*, 761.
8. DELAY OF FIVE OR SIX YEARS TO COMPLAIN OF A PURCHASE MADE BY AN AGENT, is not fatal where all the complainants are non-residents, and some of them are infants and others *femes covert*. *Buckles v. Laferty*, 752.
See JUDGMENTS, 24; LANDLORD AND TENANT, 3.

STATUTES.

See CRIMINAL LAW, 2; EMINENT DOMAIN; PROCESS, 7; STREETS; SUCCESSION; WILLS, 3, 25, 26.

STOCKHOLDERS.

See CORPORATIONS, 3; SUBSCRIPTION.

STREETS.

1. ONE CLAIMING TITLE TO LANDS UNDER SALE BY MUNICIPAL CORPORATION, for unpaid assessment for opening a street, must show that all the re-

quirements of its charter were strictly complied with, or his title will fail. And where such charter requires that an application to have a street laid out, shall come from a majority of the owners of the property liable to be assessed, if the purchaser fails to prove that such application was signed by a majority of such owners, the title of the former owner must prevail. *Sharp v. Johnson*, 259.

2. WHERE STATUTE REQUIRES NOTICE TO BE GIVEN TO OWNERS OF LANDS about to be taken for opening a street, in order that reasonable compensation may be made for such lands, such notice must be given to the owners, before appraisers can be appointed to determine the value of said lands. *Id.*
3. WHERE LANDS IN A CITY OR TOWN ARE DIVIDED INTO LOTS, they must be valued by lots, and not by blocks, in making assessments upon them for opening streets. *Id.*
4. ASSESSMENT ON LAND FOR STREET IMPROVEMENT MUST DESCRIBE THE LOTS ASSESSED, so that they can be identified, or a sale under such assessment will be void, and merely stating the number of feet front is not a sufficient description. *Id.*
5. WHERE COLLECTOR IS REQUIRED TO MAKE AFFIDAVIT that the owner of a lot assessed can not be found, or that he has not sufficient personal estate in the city or town to pay the assessment, before such lot can be sold for the assessment, the want of such an affidavit will be fatal to a sale. *Id.*

See DEDICATION, 6.

SUBROGATION.

See SURETYSHIP, 6, 7.

SUBSCRIPTION.

SUBSCRIBER TO STOCK OF RAILWAY CORPORATION WHOSE CHARTER IS AMENDED after his subscription and without his consent, by superadding to the original object of the incorporation an authority to establish a line of water communication, in connection with the railroad, involving large additional expense, and to increase the capital stock for that purpose, is not liable for his subscription, although such amendment is accepted by the board of directors and also by a majority of the stockholders. *Hartford etc. R. R. Co. v. Crowell*, 354.

SUCCESSION.

1. BASTARDS ARE NOT INCLUDED BY THE WORD "CHILDREN" in the statute of descents and distributions. *Porter v. Porter*, 55.
2. BASTARD CAN NOT INHERIT at common law, nor can he transmit property by descent, except to his own issue. *Norman v. Heist*, 493.
3. STATUTE DECLARING CHILDREN OF DECEASED BASTARD CAPABLE TO INHERIT and transmit the estate of such bastard's deceased mother, as fully as if he had been legitimate, is unconstitutional, so far as it attempts to divest the estate of the mother already vested in her lawful heirs, though it may operate prospectively, if such heirs should die intestate and without issue. *Id.*

SUNDAYS.

1. GIVING A PROMISSORY NOTE IS SECULAR BUSINESS, and within the purview of a statute prohibiting such business on Sunday. *Allen v. Deming*, 179.

2. PROMISSORY NOTE MADE AND DELIVERED ON SUNDAY IS VOID, and no subsequent acts of the parties can ratify it. *Id.*
3. INDORSE OF A PROMISSORY NOTE VOID BECAUSE MADE ON SUNDAY can maintain no action upon it. Whether an action could be maintained if the indorsee had no knowledge of its invalidity, *quære. Id.*

SURETYSHIP.

1. WHERE MERE SURETY FOR ANOTHER IS COMPELLED TO PAY DEBT, which the latter in equity and justice ought to have paid, he is entitled to relief against him who was in fact the principal debtor, whether he became such surety by actual contract or by operation of law. *Hunt v. Amidon*, 283.
2. SURETY COULD NOT MAINTAIN ACTION AGAINST CO-SURETY AT LAW formerly in this state; the remedy was in equity. *Powell v. Matthias*, 427.
3. LIABILITY OF SURETY AT COMMON LAW was his aliquot proportion of the money, ascertained by the number of sureties; the death or insolvency of one of the sureties did not enlarge the other's liabilities. *Id.*
4. RULE OF COMMON LAW OF ENGLAND adopted in this state by the act of 1807, R. S., c. 113, sec. 2. *Id.*
5. SURETY CAN NOT MAINTAIN JOINT ACTION AGAINST HIS CO-SURETIES at law to recover their share of the liability, but each must be sued separately for his own liability. *Id.*
6. SURETY DISCHARGING BOND OR JUDGMENT, which is the only security the creditor has taken, has nothing to which he can be subrogated. *Uzzell v. Mack*, 648.
7. SURETY, PAYING ANY PART OF BOND FOR PURCHASE MONEY, when vendor also reserved a lien upon the land, is subrogated to the vendor's rights under the lien. *Id.*
8. DEMAND MUST BE ALLEGED AND PROVED IN ACTION AGAINST SURETY on a bond filed by a plaintiff on commencing an action, conditioned that such plaintiff will pay "on demand" all costs awarded to the defendant, because the demand is parcel of the contract, though no demand need be averred in suing a party on his agreement to pay his own debt on demand. *Nelson v. Bostwick*, 310.
9. BREACHES MUST BE ASSIGNED IN DECLARATION ON BOND other than for the payment of money at a particular time or in specified installments, under 2 N. Y. R. S. 378, sec. 5. Hence such an assignment is necessary in an action against a surety on a bond filed by the plaintiff in an action, conditioned for the payment by such plaintiff, on demand, of all costs awarded to the defendant, and the omission of such assignment is fatal even after verdict and nominal damages can not be allowed. *Id.*

See ATTACHMENTS, 3.

SURPRISE.

See NEW TRIAL.

SURVIVORSHIP.

See HUSBAND AND WIFE, 3, 3.

TAXATION.

1. **SELECTMEN, IN THE ASSESSMENT AND COLLECTION OF TAXES**, do not act as a court. Their acts are not regarded as judgments. They are liable to an action by a party aggrieved for any wrongful exercise of their authority. *Henry v. Sargeant*, 146.
2. **TAXES IN VERMONT MUST BE ASSESSED UPON THE LISTS** in being and completed at the time the taxes are authorized. *Id.*
3. **SELECTMEN WHO ASSESS THE TAX AND ISSUE A WARRANT** for its collection are responsible, if such tax is illegal by reason of informality in the listing. *Id.*
4. **FAILURE TO PERFECT THE LIST** according to the convention of listers, invalidates any tax assessed thereon. *Id.*

TENANT BY SUFFERANCE

See LANDLORD AND TENANT, 2, 3.

TENANTS IN COMMON.

See CO-TENANCY.

TITLE.

See EVIDENCE, 8, 9.

TOLL.

See STATUTE OF FRAUDS, 5.

TRESPASS.

1. **TRESPASS QUARE CLAUSUM FREGIT CAN BE MAINTAINED ONLY** by the owner of the fee or by one in exclusive possession of the premises entered upon. *Bakersfield Cong. Soc. v. Baker*, 668.
2. **IDEM—A RELIGIOUS SOCIETY ENTITLED TO THE USE OF A MEETING-HOUSE** for all religious purposes, but who are not the owners of the fee therein, this being a separate society composed of the pewholders in the meeting-house, can not maintain an action of trespass *quare clausum fregit* for a breaking and entering into the meeting-house whereby the exercise of their right was interrupted. *Id.*
3. **ACTION FOR MONEY HAD AND RECEIVED** will lie, when intruders or trespassers collect that which belongs to another. *O'Conley v. City of Natchez*, 87.
4. **WRONG-DOERS HAVING CONVERTED PROPERTY INTO MONEY**, the trespass or trover may be waived, and action brought for money had and received. *Id.*

See ATTACHMENTS; INDEMNITY; INJUNCTIONS, 1; PROCESS, 3; STATUTE OF FRAUDS, 8, 10.

TROVER.

See ABANDONMENT, 2; ATTACHMENTS, 6; CO-TENANCY, 1, 2, 4.

TRUSTS AND TRUSTEES.

1. **TRUST RESULTING FROM PAYMENT OF CONSIDERATION BY THIRD PERSON** on a purchase of land, results only in favor of such person, and descends

- to his heirs, and does not inure to the benefit of one for whom the purchase might have been intended to be made. *Padgett v. Lawrence*, 232.
2. **RESALE WILL BE ORDERED OF LANDS PURCHASED** by one holding a confidential relation. The manner of making such resale and of taking the account with such purchaser stated by the court. *Buckles v. Laferty*, 752.
- See **HUSBAND AND WIFE**, 1-4

USAGE.

- PARTICULAR CUSTOM BECOMES A PART OF THE LAW** when well understood and established. The evidence of one individual will not establish a custom or usage of trade. *Halsey v. Cole*, 603.

USURY.

1. **SALE OF NEGOTIABLE PAPER AT DISCOUNT IS NOT USURIOUS**, as between the vendor and vendee, where the former is the holder and apparent owner, and represents that the paper belongs to him, and is business paper, although such representation is false, and the paper was in fact made for the sole purpose of sale at a usurious discount, if the vendee purchases *bona fide*, with no knowledge of such purpose. *Holmes v. Williams*, 250.
2. **NOTE SOLD AT GREATER DISCOUNT THAN THE LEGAL INTEREST** does not thereby become usurious, if the payee has received it in a business transaction. *Ramsey v. Clark*, 645.
3. **ACCOMMODATION NOTE DOES NOT BECOME USURIOUS** by being sold at a greater discount than the legal rate of interest, unless the purchaser knew that it was obtained for that purpose. *Id.*

VENDOR AND VENDEE.

1. **VENDEE IS NOT BOUND TO DISCLOSE THE FACT** that there is a gold mine on the land sold, though, if, on being interrogated as to that, he denies all knowledge, the denial will be a fraud. *Smith v. Beatty*, 435.
2. **VENDOR'S FRAUD IN CONTRACT OF SALE IS NO BAR TO ACTION FOR PRICE**, where the contract has been fully executed by delivery or conveyance, and the property is not shown to be absolutely worthless, and has not been returned or reconveyed on discovering the fraud. Principle applied to an executed sale of land. *Van Eppe v. Harrison*, 314.

See **DAMAGES**, 5; **EQUITY**, 8; **FIXTURES**; **FRAUD**, 1; **SET-OFF**, 7, 8, 9; **SPECIFIC PERFORMANCE**; **SURETSHIP**, 7.

VERDICT.

See **JURY AND JURORS**.

WARRANTY.

See **AGENCY**, 2; **DAMAGES**, 3, 4; **DEEDS**, 1; **EQUITY**, 11; **FRAUD**, 1; **INSURANCE—FIRE**, 1.

WATERCOURSES.

See **FERRIES**.

WHARFAGE.

See **CONSTITUTIONAL LAW**, 11.

WIFE'S EQUITY.

See HUSBAND AND WIFE, 11.

WILLS.

1. **ATTESTATION CLAUSE TO WILL, SHOWING COMPLIANCE WITH ALL LEGAL REQUISITES** in its execution, is not absolutely necessary to its validity under the New York statute, but that fact may be proved by the witnesses, or presumed from circumstances, if the witnesses are dead or otherwise unable to testify. *Chaffee v. Baptist Missionary Conv.*, 225.
2. **ATTESTATION CLAUSE TO WILL IS NOT CONCLUSIVE EVIDENCE** of compliance with legal formalities in its execution, as therein stated, but may be contradicted by the witnesses; but it is presumptive evidence of such compliance, if the witnesses are dead, or from lapse of time do not remember the facts. *Id.*
3. **STATUTORY REQUISITES IN EXECUTING WILL MUST BE SUBSTANTIALLY COMPLIED WITH** to render it valid, and the *onus* to show such compliance is on the proponents of the will. *Id.*
4. **TESTATOR MUST SUBSCRIBE WILL AT END THEREOF IN PRESENCE OF EACH WITNESS** attesting it, or must acknowledge to each witness that he has so subscribed it, to render it valid under the New York statute, but he may sign by making his mark, or another may subscribe his name in his presence and by his direction. *Id.*
5. **WHERE TESTATOR EXHIBITS WILL TO WITNESSES ALREADY SIGNED**, and putting his finger on his name, acknowledges that it is his will, and requests them to attest it, but it is not shown that he signed the will in the presence of each of them, or acknowledged to them that he had so signed, or that another had done so for him, in his presence and by his direction, the will is invalid, although the attestation clause states that the will was signed in the presence of the witnesses. *Id.*
6. **PROponents OF WILL SHOULD NOT BE CHARGED WITH COSTS**, where it is declared invalid in the court of chancery, on appeal, on account of a technical defect in its execution, and they have litigated it in good faith. *Id.*
7. **WITNESSES ATTESTING WILL** must subscribe their names within the sight of the testator as he stood and not as he might or might not stand. *Reynolds v. Reynolds*, 599.
8. **ATTESTATION OF WILL BY WITNESSES IN AN ADJOINING ROOM** is not a compliance with statute requiring it to be done "in the presence of the testator," even though he might have seen them, writing their names, by sitting on the side of his bed. *Id.*
9. **BURDEN OF PROVING A WILL DULY AND LEGALLY EXECUTED**, rests upon the parties claiming under such will. *Id.*
10. **WORD "ESTATE" STANDING BY ITSELF CARRIES A FEE**, but it is not a word of art, but of interpretation, and its meaning is affected by other clauses and dispositions in a will. *Zimmerman v. Anders*, 552.
11. **WHERE TESTATOR GIVES TO HIS WIFE "THE RESIDUE AND REMAINDER OF HIS ESTATE NOT BEQUEATHED,"** and then proceeds to give to another what is left after paying her funeral expenses, the intention to give her an estate for life only, is manifest, and the limitation over is not repugnant to the previous devise, but explanatory of it. *Id.*

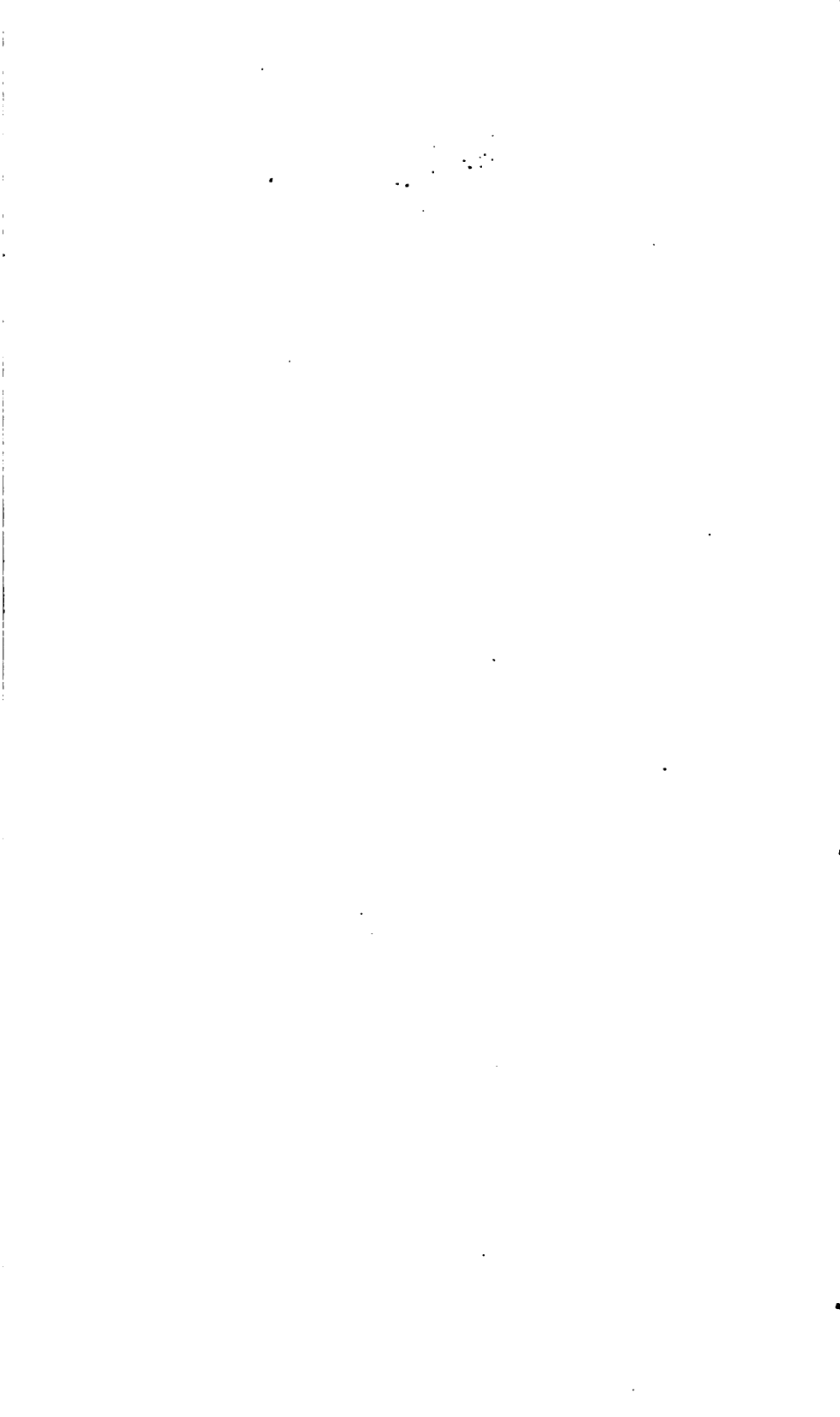
12. **WHERE DEVISEE FOR LIFE DIES BEFORE THE TESTATOR**, the remainder-man takes an immediate estate in possession upon the testator's decease. *Id.*
13. **DEVISE TO ASSOCIATION FOR RELIGIOUS PURPOSES, UNINCORPORATED** at the time of the testator's death, but since incorporated, is good in Pennsylvania. *Id.*
14. **THE CONSERVATIVE PROVISIONS OF THE STATUTE OF 43 ELIZ.**, c. 4, are in force in Pennsylvania by common usage and constitutional recognition. *Id.*
15. **NUNCUPATIVE WILL, STATUTE OF TENNESSEE** (code, section 2165) concerning, is sufficiently complied with, by decedent addressing himself to two witnesses, saying: "I wish to make a disposition of my effects." The language of the statute need not be used. *Baker v. Dodson*, 650.
16. **WHERE A MUTILATED WILL IS FOUND**, the testator, in the absence of proof, is presumed to have done the act, if it was done while in his possession or is discovered among his papers canceled or defaced. *Bennett v. Sherrod*, 410.
17. **IDEM—PRESUMPTION THAT TESTATOR MUTILATED WILL DOES NOT APPLY** where it is found in that condition under the control of a person to be benefited by its revocation, and where such person, on being asked for it, acknowledged that there was a will, said nothing about the mutilation, refused then to deliver it up, and it was not obtained till the following day. *Id.*
18. **VESTED LEGACY** is given where a testator, after providing for the sale of his estate, directs as follows: "The net proceeds of my estate, heretofore ordered by me to be disposed of, shall be equally divided between my remaining children, share and share alike, and at the times of their severally arriving at the age of twenty-one years;" and the husband and administrator of a daughter who dies under age, without issue, is entitled to her share. *Reed v. Buckley*, 531.
19. **WORD "HEIRS" MEANS LEGAL REPRESENTATIVES, AND MAKES LEGACY VESTED** in cases where it would otherwise be contingent. *Id.*
20. **LEGACY CAN BE GIVEN ONLY BY EXPRESS WORDS** or probable implication. *Nyc's Estate*, 498.
21. **BEQUEST OF "REMAINDER OF MY PERSONAL ESTATE**, not hereinbefore nor hereinafter specified, etc., excepting what is herein reserved and bequeathed," carries the principal of a sum which in a previous part of the will is directed to be put at interest for the benefit of the testator's widow for life, where such principal is not otherwise disposed of, directly or by implication, and the whole tenor of the will indicates that the testator's intention was to bequeath his entire estate. *Id.*
22. **WHAT IS A "REASONABLE AND COMPETENT SUPPORT"** as provided for in a will, does not mean merely the food and clothing necessary to sustain life, but a support in the place and manner in which a party has been accustomed to live. *Eulerbe v. Eulerbe*, 623.
23. **BEQUEST FOR REASONABLE AND COMPETENT SUPPORT DOES NOT TAKE EFFECT** when the party in whose favor the bequest is made has sufficient property for her own support. *Id.*
24. **PARENT CAN NOT CLAIM ALLOWANCE FOR SUPPORT OF HER CHILD** when she has sufficient means to support him, although a will provides that she and her child have a reasonable and competent support out of the proceeds of the estate. *Id.*

25. REMEDY TO CREDITORS BY BOND AND SPECIALTY, IN AN ACTION OF DEBT, against the devisee and the heir who had aliened, was given by the statute of 3 and 4 Wm. and Mary, c. 14, which remedy was extended to the colonies by the third section of the act of 5 Geo. II., and may be considered as part of our common law. *Ticknor v. Harris*, 186.
26. SUCH STATUTE DID NOT PROVIDE FOR THE MAINTENANCE of an action at law by the creditor of an estate against a legatee, to recover his debt, and consequently no such action can be sustained. *Id.*
27. LEGATEES HAVE NO RIGHT TO SET ASIDE A SALE of the decedent's estate, except so far as may be requisite to protect their interests. *Buckles v. Laferty*, 752.
28. BEFORE LEGATEES ARE ALLOWED A DECREE VACATING A SALE OF REAL ESTATE, the court should ascertain the amount due them, and if such amount can be paid out of the moneys set aside for such purpose, or is paid by the purchaser, the sale should be allowed to stand. *Id.*
See ESTATES OF DECEASED PERSONS, 2-4, 7.

WITNESSES.

1. STATUTORY REQUIREMENT OF WITNESSES TO THE EXHIBITION OF AN INSTRUMENT means subscribing witnesses. *Beach v. Botsford*, 45.
2. AGENT TO SELL CHATTEL MAY BE WITNESS FOR THE OWNER in an action for the price thereof, unless it be proved that he is liable for negligence or misfeasance, and without such proof the law presumes against his negligence or misfeasance. *Scott v. Wells*, 568.
3. EXPOSURE TO POSSIBILITY OF ACTION IS A CONTINGENT INTEREST, which goes only to the credibility of a witness. *Id.*
4. WITNESS INTERESTED IN THE EVENT OF THE SUIT is competent when called by the party whose interest is adverse to his. *Doe v. Jackson*, 107.
5. PARTY TO THE RECORD CAN NOT BE COMPELLED, against his consent, to become a witness. *Tenney v. Evans*, 194.
6. AGENT OR SERVANT MAY BE A WITNESS for his principal. *Wainwright v. Straw*, 675.

See PLEADING AND PRACTICE, 15, 16; WILLS.









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